No. 97-454-CFX Title: United States, Petitioner
v.
Bestfoods, et al.

Docketed: September 11, 1997 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Jul 31 1997	Application (A97-93) to extend the time to file a petition for a writ of certiorari from August 11, 1997 to September 10, 1997, submitted to Justice Stevens.
	Aug 4 1997	Application (A97-93) granted by Justice Stevens extending the time to file until September 10, 1997.
	Sep 10 1997	Petition for writ of certiorari filed. (Response due November 12, 1997)
	Sep 10 1997	Appendix of petitioner United States filed.
	Sep 23 1997	Order extending time to file response to petition until November 12, 1997.
	Oct 1 1997	Order extending time to file response to petition until November 12, 1997.
	Oct 1 1997	This extension is granted for all respondents.
	Oct 8 1997	Brief of respondent Michigan in opposition filed.
	Nov 12 1997	Brief of respondents Aerojet-General Corporation, et al. in opposition filed.
	Nov 12 1997	Brief of respondents CPC International Inc., et al. in opposition filed.
	Nov 25 1997	DISTRIBUTED. December 12, 1997
	Dec 2 1997	Reply brief of petitioner United States filed.
	Dec 10 1997	Supplemental brief of respondents Aerojet-General Corporation, et al. filed. VIDED.
	Dec 12 1997	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 24, 1998. **********
	Dec 29 1997	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Jan 12 1998	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
	Jan 23 1998	Brief of petitioner United States filed.
	Jan 23 1998	Brief of respondent Michigan Department of Environmental Quality in support of petition filed.
	Jan 23 1998	Brief amici curiae of Minnesota, et al. filed.
	Feb 2 1998	Record filed.
	Feb 11 1998	CIRCULATED.
	Feb 20 1998	Brief of respondents Bestfoods, et al. filed.
	Feb 20 1998	Brief of respondents Aerojet-General Corporation, et al. filed.

No. 97-454-CFX

Entry	Date	Proceedings and Orders
	Feb 20 1998	Brief amicus curiae of Atlantic Legal Foundation filed.
	Feb 20 1998	Brief amici curiae of National Association of Manufacturers, et al filed.
	Feb 20 1998	Brief amicus curiae of Atlantic Richfield Company and Newmont Mining Corporation filed.
	Feb 20 1998	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Feb 20 1998	Brief amicus curiae of United States Business & Industrial Council filed.
	Feb 20 1998	Brief amici curiae of American Forest & Paper Association, et al. filed.
	Mar 2 1998	Motion of respondent Aerojet-General Corporation, et al. for divided argument filed.
	Mar 5 1998	Opposition of respondent to motion of respondent Cordova Chemical Company of Michigan, et al. for divided argument filed.
	Mar 6 1998	Reply of respondents Aerojet-General in support of motion for divided argument.
	Mar 9 1998	Motion of respondent Aerojet-General Corporation, et al. for divided argument DENIED. The Court will hear argument from respondent Bestfoods.
	Mar 9 1998	Supplemental brief of respondent Bestfoods filed.
	Mar 13 1998	Reply brief of petitioner United States filed.
	Mar 18 1998	Brief of respondents Aerojet-General Corp. and Cordova Chemical filed.
	Mar 24 1998	ARGUED.

Supreme Court, U.S.
FILED
97 • 454 SEP 10 1997

No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the federal government to respond to public dangers resulting from the improper disposal of hazardous substances. Section 107(a)(2) of CERCLA provides that any corporation that "owned or operated any facility at which such hazardous substances were disposed of" shall be liable to the United States for the government's response costs at the facility. 42 U.S.C. 9607(a)(2). The question presented is:

Whether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's facility.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents are CPC International, Inc., Aerojet-General Corporation, Cordova Chemical Company, Cordova Chemical Company of Michigan, and the Michigan Department of Environmental Quality. The Michigan Department of Environmental Quality has filed a separate petition for a writ of certiorari. See *Michigan Dep't of Envtl. Quality* v. *CPC International, Inc.*, No. 97-296.

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UNITED STATES OF AMERICA, PETITIONER

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CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-54a) is reported at 113 F.3d 572. The opinion of the district court (Pet. App. 55a-129a) is reported at 777 F. Supp. 549. The initial opinion of the court of appeals (Pet. App. 130a-170a) is reported at 59 F.3d 584. The court of appeals' order granting rehearing (Pet. App. 171a-172a) is reported at 67 F.3d 586.

JURISDICTION

The court of appeals entered its initial decision on July 14, 1995. The court of appeals granted a petition for rehearing and suggestion for rehearing en banc on October 19, 1995, and it entered its en banc decision on May 13, 1997. On August 4, 1997, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607(a), provides in relevant part:

(a) Covered persons; * * *

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

* * * * *

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

* * * * *

shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

* * * * *

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public from the release of hazardous substances and to recover the government's expenses from the responsible parties. The United States brought this CERCLA action against CPC International, Inc. (CPC), Aerojet-General Corporation (Aerojet), and other parties to recover the government's past and future costs of responding to a release of hazardous substances at a former chemical manufacturing plant near Muskegon, Michigan. The United States District Court for the Western District of Michigan ruled that CPC, Aerojet, and their subsidiaries are liable for the federal government's response costs, specifically finding CPC and Aerojet liable as operators of the facility. A divided court of appeals reversed the district court's decision as to CPC and Aerojet. On petition for rehearing and suggestion for rehearing en banc, a divided en banc court of appeals reached the same result and reversed the district court's determination that CPC and Aerojet are liable as operators.

1. "CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Congress enacted CERCLA in 1980, in response to the serious public health threats posed by abandoned or inactive waste disposal facilities. See, *e.g.*, H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17-22 (1980). Committee reports describing those threats concluded that

existing federal laws prospectively regulating hazardous waste disposal were "clearly inadequate to deal with this massive problem" and that special legislation was needed "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with [those] sites." *Id.* at 17-18, 22.

CERCLA establishes a basic framework for government action in response to releases and threatened releases of hazardous substances. Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604. Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue orders and to seek injunctive relief to compel liable persons to respond to releases or threats of release. 42 U.S.C. 9606.[1]

CERCLA also provides a mechanism for financing government-initiated cleanups of hazardous waste sites. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42

[1] CERCLA grants authority to the President, who has delegated most of the authority for administering CERCLA to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 12,580, 3 C.F.R. 193 (1988 comp.), *reprinted in* 42 U.S.C. 9615 note.

U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against responsible parties under Section 107 of CERCLA to recover the government's response costs and replenish the Superfund. 42 U.S.C. 9607. Section 107 allows parties other than the federal government to recover necessary costs of response in certain circumstances, while Section 113 allows liable parties to seek contribution from other liable parties. See CERCLA § 107(a)(B), 42 U.S.C. 9607(a)(B); CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

The United States is entitled to cost recovery under Section 107 if it establishes four basic elements that, Congress has determined, justify the imposition of liability. The United States must show that: (1) there has been a "release" or "threatened release" of "hazardous substances" from a site; (2) the site is a "facility"; (3) the release or threatened release has caused the United States to incur "response costs"; and (4) the defendant is a party who, under the standards that Congress has set out in CERCLA, is responsible for the government's incurring of those costs. CERCLA § 107(a), 42 U.S.C. 9607(a); see, *e.g.*, *B.F. Goodrich Co.* v. *Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1378-1379 (8th Cir. 1989).

Section 107(a) specifically identifies four categories of parties who are potentially liable for the government's response costs. They are: (1) current owners and operators of a facility at which there is or has been a release or threatened release of a hazardous substance; (2) persons who owned or operated the facility at the time of disposal of a hazardous substance; (3) persons who arranged for disposal or treatment of a hazardous substance at the facility; and

(4) persons who selected the site and transported hazardous substances to the facility. CERCLA § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4).[2]

The courts have consistently ruled that, once the United States has established the four elements of CERCLA liability, the responsible party is strictly liable, without any additional showing of causation, for the government's response costs. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chems.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

The courts have also consistently ruled that, if the harm from the release of hazardous substances is indivisible, the responsible parties are jointly and severally liable. *E.g.*, *Kayser-Roth*, 910 F.2d at 26; *R.W. Meyer*, 889 F.2d at 1507; *Aceto Agric. Chems.*, 872 F.2d at 1377; *Monsanto*, 858 F.2d at 172. Responsible parties may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113, 42 U.S.C. 9613. See *R.W. Meyer*, 889 F.2d at 1507; *Monsanto*, 858 F.2d at 173; see also H.R. Rep. No. 253, 99th Cong., 1st. Sess. Pt. 1, at 79 (1985).

2. This case arises out of the United States' attempt to recover its costs of responding to acutely

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[2] CERCLA provides definitions of a number of the relevant terms, including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal." See CERCLA § 101, 42 U.S.C. 9601 (1994 & Supp. II 1996).

hazardous conditions at a former chemical manufacturing plant in Dalton Township, Michigan, commonly known as the "Muskegon" site. A series of chemical companies extensively contaminated that site through operations from 1959 through 1986.

a. The Ott Chemical Company (Ott I), a publicly traded Michigan corporation managed by principal shareholder Arnold Ott, owned the Muskegon site from 1957 to 1965. Ott I located its sole chemical manufacturing facility at that site, and it engaged in various activities that resulted in the disposal and release of hazardous substances. For example, Ott I discharged waste water containing hazardous substances into two unlined lagoons at one part of the site, it buried drums containing hazardous substances at another, it spilled hazardous substances in the processing and loading areas of the site, and it dumped hazardous substances in a wooded portion of the site. By 1964, test results showed that Ott I's disposal practices had contaminated the groundwater flowing beneath the site. Pet. App. 60a-61a, 63a-64a.

b. In 1965, CPC acquired Ott I by incorporating a new subsidiary that purchased Ott I's assets in exchange for CPC stock and assumed the name of Ott Chemical Company (Ott II). Pet. App. 65a-66a. Arnold Ott became an officer of CPC. Ott I changed its name to the Muskegon Chemical Company and shortly thereafter ceased to exist. *Id.* at 66a. Under CPC's ownership, Ott II expanded the chemical manufacturing activities and waste disposal activities at the Muskegon site. *Id.* at 66a-67a. CPC actively participated in and exerted control over Ott II's business, including environmental matters, through the direct involvement of Arnold Ott and other CPC officers in Ott II's policy decisions and day-to-day opera-

tions. *Id.* at 67a-77a. CPC continued those operations through 1972. *Id.* at 78a.

c. In 1972, CPC sold Ott II to Story Chemical Company, a Georgia corporation. Pet. App. 59a, 78a. Story continued Ott II's operations under the name of Four Lakes Chemical Company. Story, however, soon encountered financial problems and, in 1976, it filed for bankruptcy protection. *Ibid.* Story was adjudicated bankrupt in 1977, and title to the Muskegon site passed to the bankruptcy trustee. *Ibid.* The Michigan Department of Natural Resources (MDNR) recognized that the Muskegon site posed severe environmental hazards, and it became actively involved in efforts to attract a buyer for the site. *Id.* at 79a-81a.

d. In 1977, after extensive discussions with MDNR, Aerojet arranged to acquire the Muskegon site. Pet. App. 81a-83a, 92a. Aerojet created a wholly owned California subsidiary called Cordova Chemical Company (Cordova/California) that purchased the Muskegon site from the Story bankruptcy trustee. *Id.* at 82a-83a, 93a. In connection with that purchase, Cordova/California and MDNR entered into an agreement under which Cordova/California agreed to undertake certain cleanup actions, MDNR agreed to share in the funding of those actions, and MDNR agreed to indemnify Cordova/California for other expenses. *Id.* at 83a-91a.

e. In 1978, shortly before commencement of chemical manufacturing activities at the site, Cordova/California created a wholly owned Michigan subsidiary, Cordova Chemical Company of Michigan (Cordova/Michigan), and transferred ownership of the Muskegon site to that company. Pet. App. 93a-94a. With the active participation of Aerojet, the Cordova

companies conducted chemical production activities at the Muskegon site until 1986. *Id.* at 93a-100a.

f. In 1981, shortly after the enactment of CERCLA, the EPA identified the Muskegon site as posing extraordinary public health risks. In 1982, the EPA placed the site on the NPL. See p. 4, *supra*; 40 C.F.R. Pt. 300, Apps. A and B (Table 1). Since that time, the EPA has incurred response costs in developing and implementing a comprehensive, multi-million dollar remedial plan to protect the public from harm. The final remedy will decontaminate the soil, surface water, and groundwater at the site. See Pet. App. 62a-63a.

3. The United States filed a cost recovery action under Section 107 of CERCLA, naming five entities as responsible parties: (1) CPC; (2) Aerojet; (3) Cordova/California; (4) Cordova/Michigan; and (5) Arnold Ott. In anticipation of the United States' suit, CPC had already filed an action for contribution from Aerojet, Cordova/California, Cordova/Michigan, and MDNR. CPC also filed a third-party complaint against its insurer. The district court consolidated the actions and scheduled them for trial in three phases addressing, sequentially, the issues of liability, remedy, and insurance coverage. Pet. App. 56a n.1. On the eve of the liability trial, Arnold Ott reached a settlement with the United States respecting his liability. *Id.* at 56a n.2.

The district court conducted a 15-day bench trial on the liability of the remaining parties. Those parties stipulated that there had been "releases" of "hazardous substances" from the Muskegon site, that the Muskegon site is a "facility," and that the United States had incurred reimbursable "response costs." See Pet. App. 63a. The trial accordingly focused on

whether the non-settling entities had owned the facility, operated the facility, or arranged for disposal of wastes at the facility within the meaning of Section 107(a) of CERCLA. In resolving those issues, the district court specifically concluded that CPC and Aerojet are liable under Section 107(a)(2) of CERCLA on the ground that each had directly participated in the operation of the Muskegon site during a relevant time period. *Id.* at 128a-129a; see *id.* at 65a-78a, 92a-100a, 110a-112a, 123a-125a.[3]

The district court concluded that "a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." Pet. App. 107a. The court found CPC and Aerojet liable under that standard. See *id.* at 110a-112a, 123a-125a.

The district court set out extensive factual findings in support of its conclusion. In relation to CPC, the court specifically found, for example, that:

(1) "CPC actively participated in, and at times controlled, the policy-making decisions of its subsidiary through its representation on the Ott II board of directors," which "functioned as a major source of power and decision-making at the company" (Pet. App. 67a);

(2) "CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest

[3] The district court made a number of other liability rulings. See Pet. App. 128a-129a. Those rulings are not at issue in this petition.

levels of the subsidiary's management" (*id.* at 69a);

(3) "CPC's development company also actively participated in and exerted control over policy-making at Ott II in efforts to enhance performance, shape decisions and affect personnel changes" (*id.* at 72a);

(4) "CPC actively participated in Ott II environmental matters" (*id.* at 74a);

(5) "CPC also exerted significant control over Ott II's finances," "actively participated in some Ott II labor matters," and "also participated in other aspects of Ott II's business" (*id.* at 76a, 77a).

The court determined that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 111a.

The district court similarly found that Aerojet, like CPC, "operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan," and that "Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary." Pet. App. 124a. The court accordingly concluded that Aerojet, like CPC, is directly liable as an operator under Section 107(a)(2). *Id.* at 123a-125a.

The district court noted that, while CERCLA imposes direct liability on a corporation based on its own participation in the operation of a facility, a corporation may also be subject to vicarious liability for a subsidiary's actions through the application of equita-

ble principles that allow a court to disregard the separate corporate identities of a parent and its subsidiary "to prevent fraud, illegality or injustice." Pet. App. 108a-109a. The court found the evidence sufficient under that so-called "veil-piercing" theory to hold Aerojet vicariously liable as a present owner of the facility under Section 107(a)(1) of CERCLA. *Id.* at 119a-122a. The court concluded that, in light of its holding that Aerojet and CPC were directly liable as operators under Section 107(a)(2) based on their own actions, there was no need to apply the state veil-piercing theory in that context. *Id.* at 112a, 124a-125a.

4. A divided panel of the Sixth Circuit reversed various aspects of the district court's decision, including its conclusion that CPC and Aerojet are liable as past operators of the Muskegon facility. See Pet. App. 130a-170a. The panel majority ruled, as a matter of law, that CPC and Aerojet cannot be held liable under CERCLA as operators of the Muskegon site unless the evidence provides a basis for disregarding their corporate form under state-law veil-piercing principles. *Id.* at 143a-144a. The court also held that, under Michigan state law, the corporate veil may be pierced only upon a finding of a fraudulent purpose. *Id.* at 144a.

5. The United States filed a petition for rehearing and suggestion for rehearing en banc on the question whether CPC and Aerojet are directly liable as operators under Section 107(a)(2) of CERCLA. The court of appeals granted the petition and vacated the panel decision. Pet. App. 171a-172a. On rehearing en banc, a divided court of appeals reversed the district court's judgment with respect to the two parent corporations. *Id.* at 1a-54a.

In a 7 to 5 vote, the court of appeals rejected the legal theory, urged by the United States and relied upon by the district court, that a parent corporation may be held liable under CERCLA as an "operator" of a facility by virtue of the parent corporation's active participation in and exercise of control over the management and operations of a subsidiary that owns the facility. The court acknowledged that a parent corporation could "conceivably" be liable as an operator in some situations:

> At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary.

Pet. App. 12a. The court concluded, however, that "this is not a theory of operator liability relied upon by the district court, or alluded to in its opinion." *Ibid.* The court characterized the district court's decision as holding that "parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries." *Id.* at 13a. It specifically rejected that ruling, stating:

> [W]here a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met.

Id. at 15a. The court additionally stated that the federal government must satisfy the state-law standards for piercing the corporate veil, which in Michigan would require a showing that "adherence to the fiction of separate corporate existence would sanction a

fraud or promote injustice." *Id.* at 16a. The court concluded that, under Michigan law, the facts did not provide an adequate basis for piercing the corporate veil with respect to the two parent corporations involved in this case. *Id.* at 16a-17a, 21a-22a.[4]

Judge Ryan, joined by four other judges, dissented from the court's decision. Pet. App. 32a-54a. The dissenting judges criticized the majority for failing to adhere to the plain language of CERCLA's liability provisions. See *id.* at 32a-34a. They concluded that Section 107(a)(2) subjects a parent corporation to direct liability as an operator of a facility if the facts show that the parent corporation "actually operat[ed] [the] facility, regardless of the nature of the entity's ostensible interest in the facility." *Id.* at 34a. The dissenting judges noted that the majority's reasoning is particularly unpersuasive in the face of the numerous decisions of other courts of appeals, which support the district court's conclusion that a parent corporation may be liable as an operator of a subsidiary's facility through its active participation in and control over the day-to-day management of the subsidiary's business. *Id.* at 34a-41a.[5]

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[4] In addition, the court of appeals directed the district court on remand to make further findings regarding whether disposal of hazardous substances occurred while Aerojet and the Cordova companies owned the site and to revisit its conclusion that those companies had failed to prove their entitlement to a third-party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3). See Pet. App. 22a-24a.

[5] The dissenting judges also criticized the majority's characterization of the district court's factual findings and its interpretation of Michigan law. Pet. App. 41a-50a. Judge Merritt, concurring in part and dissenting in part, filed a separate opinion stating that federal common law, and not state law, governs the standard for piercing the corporate veil. *Id.* at 24a-32a.

REASONS FOR GRANTING THE PETITION

The court of appeals has misinterpreted CERCLA, an important federal statute governing the United States' authority to respond to the public dangers posed by the release of hazardous substances. The court has concluded, contrary to the plain language of Section 107 of CERCLA, that a corporation that actively participates in and exercises control over a subsidiary's operations cannot be held liable, on that basis, as an operator of the subsidiary's facility. The court's decision is not only mistaken, but it squarely conflicts with the decisions of four other courts of appeals, which have consistently imposed operator liability in similar circumstances. This Court should grant the petition to correct the court of appeals' decision and resolve the conflict among the circuits on the important question of parent corporation liability under CERCLA.

1. Congress enacted CERCLA to create a federal mechanism for addressing the national problem posed by decades of improper disposal of toxic chemicals. CERCLA authorizes the United States to undertake direct response actions to protect the public from the release of hazardous substances, using federal funds earmarked for that purpose. See CERCLA § 104, 42 U.S.C. 9604. CERCLA further provides that the United States may recover its response costs from the parties that Congress has deemed responsible for creating the hazardous conditions. See CERCLA § 107, 42 U.S.C. 9607.

a. Section 107 of CERCLA establishes a federal liability standard. Of particular relevance here, Section 107(a)(2) states that the liable parties include

> any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

42 U.S.C. 9607(a)(2). Under the plain language of that provision and the pertinent CERCLA definitions, a corporation that operates a subsidiary's facility at which hazardous substances are disposed of is liable for the government's response costs.

As a threshold matter, CERCLA defines the term "person" to include a broad range of entities, including corporations and other business organizations. CERCLA § 101(21), 42 U.S.C. 9601(21). Thus, CERCLA clearly envisions that a corporation may be liable as an operator of a facility. The issue in this case accordingly turns on whether CPC and Aerojet "operated" the Muskegon site, which is the facility in question. See Pet. App. 63a; CERCLA § 101(9), 42 U.S.C. 9601(9).

CERCLA defines the "owner or operator" of a facility to include "any person owning or operating such facility," CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A), but it does not further define the term "operate." Under settled principles of statutory construction, that term should be construed in accordance with its "'ordinary or natural' meaning." *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995); *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994); *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

Under standard usage, a corporation "operates" a facility if it actively participates in, and exercises control over, the running of the facility. See, *e.g.*, *The Oxford English Dictionary* 848 (2d ed. 1989) (defining "to operate" as "[t]o direct the working of; to manage, conduct, work (a railway, business, etc.)"); *The Random House Dictionary of the English Language* 1357 (2d ed. 1987) (defining "to operate" as "to put or keep (a factory, industrial system, ranch, etc.) working or in operation"); *Webster's Third New International Dictionary* 1581 (1976) (defining "to operate" as "to manage and put or keep in operation whether with personal effort or not <*operated* a grocery store>").

The district court correctly applied that standard to the evidence and properly concluded that CPC and Aerojet, during separate time periods, had each operated the Muskegon site. For example, in the case of CPC, the district court found that the corporation had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site. See Pet. App. 67a-77a, 110a-112a. The evidence shows that Aerojet similarly engaged in active participation and control with respect to the operation of the Muskegon site during a later time period. *Id.* at 94a-100a, 123a-124a.

b. The court of appeals rejected the district court's straightforward interpretation of Section 107(a)(2). In doing so, the court engaged in a lengthy discussion of canons of construction and general principles of corporate liability, but it paid scant attention to the

actual language of Section 107(a)(2). See Pet. App. 7a-12a. It provided no explanation why the term "operated" should not be given its "ordinary or natural meaning." The court briefly discussed CERCLA's definition of "owner or operator" as it relates to facilities that have been involuntarily conveyed to a state or local government. *Id.* at 13a. But it misunderstood the significance of that portion of the definition.

Section 101(20) of CERCLA defines the term "owner or operator" with reference to the context in which the term is used. See 42 U.S.C. 9601(20) (1994 & Supp. II 1996). When Congress enacted the original version of CERCLA in 1980, Section 101(20)(A) provided in relevant part as follows:

> "[O]wner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.

Pub. L. No. 96-510, § 101(20)(A), 94 Stat. 2769. As the text of that provision indicates, Congress saw a need to address a special problem posed by abandoned facilities. Congress recognized that abandoned facilities were likely to be non-operational, and it therefore made clear in Section 101(20)(A)(iii) that the term "owner or operator" includes persons who "otherwise controlled activities" at a non-operational site before its abandonment.

When Congress amended CERCLA in 1986, it retained the original version of Section 101(20)(A)(i) and (ii), but it modified clause (iii) to address the question of state liability for abandoned facilities. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101(b)(2), 100 Stat. 1615. Congress provided that if a state or local government received "title or control" of a facility through an involuntary mechanism, such as abandonment, the "owner or operator" would be the person "who owned, operated, or otherwise controlled activities at such facility immediately beforehand." *Ibid.* Recognizing that those facilities may be non-operational, Congress carried forward the "otherwise controlled" language of the original clause. See CERCLA § 101(20)(A)(iii), 42 U.S.C. 9601(20)(A)(iii).

The court of appeals inferred from Congress's use of the "otherwise controlled" language that "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." Pet. App. 13a. As the text of the original and amended provision shows, that is simply not the case. Congress retained the "otherwise controlled" language in clause (iii) to make clear that the term "owner or operator" includes persons who "controlled activities" at an inactive facility. That language provides no basis for the illogical conclusion that the term "owner or operator" excludes persons who controlled the operations of an active facility.

The court of appeals rejected the Section 107(a)(2) liability standard that the district court employed without further analysis of the statutory terms. See Pet. App. 13a. Instead, the court invoked its own policy notions respecting appropriate liability standards for parent corporations. *Id.* at 13a-15a. Based

on those considerations, the court of appeals concluded that "the parent will be liable only when the requirements necessary to pierce the corporate veil are met." *Id.* at 15a. That conclusion misconceives the relevance of a parent-subsidiary corporate structure and misapplies the equitable doctrine for "piercing the corporate veil."

A corporation that owns a separately incorporated subsidiary is generally insulated, by virtue of the subsidiary's separate corporate form, from liability for the *subsidiary's* actions. See, *e.g.*, William O. Douglas & Carrol M. Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929). The parent corporation, however, is not insulated from liability for its *own* acts. See, *e.g.*, *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business."). Hence, in a situation, like the one presented here, where the evidence shows that a parent corporation, through the use of *its own agents*, actively participated in the subsidiary's operation of a facility, the parent corporation is directly liable under federal law. There is no need to invoke equitable doctrines for "piercing the corporate veil." See Pet. App. 35a-38a (Ryan, J., dissenting); *id.* at 112a, 124a-125a.[6]

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[6] The court of appeals suggested that the district court held CPC and Aerojet liable for "traditional" oversight of a subsidiary, implying that those corporations "participate[d] in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporations [*sic*] law." Pet. App. 13a. The district court, however, expressly found otherwise. It concluded that CPC and Aerojet engaged in conduct "that exceeds the bounds of an interested investor," *id.* at 111a, and "extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary," *id.* at 124a.

At bottom, the court has simply failed to account for "the language of the statute." See, *e.g.*, *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295 (1995); Pet. App. 32a-34a (Ryan, J., dissenting). It is Congress's prerogative to establish the appropriate standard for CERCLA cost recovery actions. Congress spoke to the issue directly in Section 107, and its standard is readily ascertainable by construing the statute according to its plain terms. As Judge Ryan noted, "the plain language of section 107(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility." *Id.* at 34a (Ryan, J., dissenting). The district court properly applied Section 107(a)(2) by reference to the ordinary meaning of the words Congress used, and it correctly found CPC and Aerojet directly liable based on the evidence before it. There is no basis, in policy or otherwise, to impose additional requirements drawn from state-law principles governing derivative liability. Cf. *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997) ("No one doubts the power of Congress to legislate rules for deciding cases like the one before us.").[7]

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[7] We note that the court's policy analysis is itself flawed. It is far from clear, for example, that "the traditional doctrine of piercing the corporate veil" provides a "relatively bright line" standard. Pet. App. 14a; compare, *e.g.*, *id.* at 29a-31a (Merritt, J., dissenting in part) (describing the federal common law standard); *id.* at 45a-46a (Ryan, J., dissenting) (disputing the majority's interpretation of the Michigan standard). As commentators have long observed, the so-called "traditional" doc-

2. The court of appeals' decision in this case not only is erroneous, but it also conflicts with the decisions of other courts of appeals that have encountered the question. Six of the other courts of appeals have squarely considered the question whether a corporation may be directly liable based on its active participation in and control over the operations of a subsidiary. Four of the circuits essentially agree with the standard that the United States urges, one adopts a broader liability standard, and one arguably follows the standard that the court of appeals adopted in this case. The court of appeals acknowledged the conflict, Pet. App. 13a-14a, which is clearly ripe for resolution.

a. Four courts of appeals have interpreted Section 107 to impose liability on corporations that actively participate in and exercise actual control over the operations of their subsidiaries. See *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), cert.

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trine is enveloped in a "mist of metaphors" that has not produced clear or uniform rules. See, *e.g.*, Douglas & Shanks, *supra*, 39 Yale L.J. at 218. It is also doubtful that the court's liability standard—which will prevent the government from recovering response costs from those parties that are actually responsible for creating the public danger—will encourage "private sector participation in the cleanup of existing sites." Pet. App. 14a. The court's interpretation is likely, instead, to thwart CERCLA's central purpose of creating "a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm." S. Rep. No. 848, 96th Cong., 2d Sess. 14, 17-18 (1980). Of course, even if the court's policy analysis were more persuasive, it is ultimately beside the point. The question of appropriate policy in this area is a matter for Congress, which has spoken to that issue through the liability standard that it has established.

denied, 498 U.S. 1084 (1991); *Schiavone* v. *Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209, 1220-1225 (3d Cir. 1993); *Jacksonville Elec. Auth.* v. *Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993).

The First Circuit ruled in *Kayser-Roth* that a parent corporation was directly liable under Section 107(a)(2) for the government's costs in responding to the release of hazardous substances at a subsidiary. 910 F.2d at 26-28. The court determined from its "analysis of the statute and its legislative purpose and history" that a corporation may be found liable as an operator on account of its pervasive involvement in the subsidiary's operations. *Id.* at 26. The court noted that other courts have consistently construed the term "operator" to include corporate officers and shareholders who participate in the operation of a facility. *Id.* at 26-27. It concluded that a parent corporation that participates in the operation of a subsidiary's facility is similarly liable. *Id.* at 27. See also *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 407-408 (1st Cir. 1993).

The Second Circuit reached a similar result in *Schiavone*, which involved a private action over the effect of an indemnification agreement on CERCLA liability. 79 F.3d at 250-251. The court observed that a parent may be charged with "owner liability" only "in circumstances that permit corporate veil piercing," but a parent may be charged with "operator liability" based on "the independent actions of the parent corporation, evidenced through its control over the polluting site." *Id.* at 254. That court specifically rejected the analysis set forth in the panel decision in this case and concluded that "direct operator liability for parent corporations is both compatible with the

statutory language and consistent with CERCLA's broad remedial scheme." *Id.* at 255. See also *Certain Underwriters at Lloyd's* v. *St. Joe Minerals Corp.*, 90 F.3d 671, 674 (2d Cir. 1996).

The Third Circuit applied the same reasoning in *Lansford-Coaldale Joint Water Authority*, which involved a private cost-recovery action under Section 107(a)(B) of CERCLA. See 4 F.3d at 1213-1214. The court concluded that a parent corporation could be held liable as an operator if "there is evidence of substantial control exercised by one corporation over the activities of the other." *Id.* at 1221. The court explicitly followed the test applied in *Kayser-Roth* and the district court decision in this case, stating that the "actual control" standard "hold[s] accountable for environmental violations those corporations which are not mere investors in other corporations, but instead have actively and substantially participated in the corporation's management." *Id.* at 1222. See also *Aluminum Co. of America* v. *Beazer East, Inc.*, No. 96-3420, 1997 WL 535176, at *10-*13 (3d Cir. Sept. 2, 1997); *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).

The Eleventh Circuit adopted the same approach in *Jacksonville Electric Authority*, which also involved a private cost-recovery action under Section 107(a)(B) of CERCLA. 996 F.2d at 1108-1109. The court stated that "[t]he plain language of the statute leads to the conclusion that a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise." *Id.* at 1110. The court concluded that a parent corporation is directly liable under Section 107(a)(2) if the parent "exercises actual and pervasive control of the

subsidiary to the extent of actually involving itself in the daily operations of the subsidiary." *Ibid.*[8]

b. The Fourth Circuit has adopted a more expansive standard of operator liability than that urged by the United States or relied upon by the district court in this case. That court has indicated in a private cost-recovery action that the mere "authority to control the facility" is sufficient for establishing operator liability. *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842, cert. denied, 506 U.S. 940 (1992). The United States does not endorse liability based solely on the "authority to control," as is commonly urged by private parties. The existence of the Fourth Circuit's standard, however, deepens the conflict among the courts of appeals.[9]

c. The Fifth Circuit is the only court of appeals that heretofore had employed the restrictive standard

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[8] In addition to the decisions of those courts, the Eighth and Ninth Circuits have indicated in dicta that a parent corporation may be held liable as an operator based on its control over a subsidiary's facility. See *United States* v. *TIC Investment Corp.*, 68 F.3d 1082, 1091 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996); *American Telephone & Telegraph Co.* v. *Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 n.8, opinion supplemented on other grounds, No. 94-16368, 1996 WL 490789 (9th Cir. Aug. 28, 1996). The Seventh and Tenth Circuits have resolved the analogous issue of whether individual corporate officers may be liable under CERCLA by applying a standard based on personal participation and actual control. See *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.2d 417, 420 (7th Cir. 1994); *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993).

[9] Indeed, because private parties frequently argue for more expansive theories of parent liability than the United States urges, there is a heightened need for the Court to address the issue and clarify the controlling standard.

of parent liability that the court of appeals applied in this case. That court initially ruled in a private cost-recovery action that a parent corporation's liability must be established through a corporate veil-piercing standard. *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (1990), cert. denied, 498 U.S. 1108 (1991). The continuing vitality of that precedent, however, is open to question. That court has since ruled that individual officers and employees may be held directly liable as operators under CERCLA, when "they themselves actually participate in the wrongful conduct prohibited by the Act," and that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (quoting *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)), cert. denied, 502 U.S. 1004 (1991).

3. As the foregoing survey demonstrates, the court of appeals' decision in this case stands in square conflict with the decisions of four other circuits, which recognize that CERCLA creates a federal liability standard that subjects corporations to direct liability based on their actual involvement in the operation of a subsidiary's facility. That conflict presents an issue of considerable importance. The United States seeks to recover its CERCLA response costs from a parent corporation when the evidence shows, as in this case, that the parent has actively participated in and exercised control over the subsidiary's operation of a facility. Because many parent corporations do not engage in the type of active participation and control shown here, the United States does not routinely seek to hold parent

corporations liable for conditions at a subsidiary's facility. The principle at issue in this case, nevertheless, is vital in ensuring that the United States can effectuate Congress's policy in responding to the public dangers posed by hazardous waste sites. Indeed, this case illustrates precisely why Congress empowered the United States to seek cost recovery from parent corporations in appropriate situations.

The Muskegon site is "one of the nation's most severely contaminated areas." Pet. App. 56a. The total federal expenditures for cleaning up hazards left by its owners and operators will total many tens of millions of dollars. Among potentially responsible parties, Ott I, Ott II, and Story no longer exist, while the Cordova companies, from the outset, have had little capital. See *id.* at 93a, 99a-100a. Hence, CPC and Aerojet are not only responsible for creating the hazardous conditions at the Muskegon site, but they are also the only responsible parties that can contribute meaningfully to the cleanup of the site. If those companies are absolved of liability, then the general public must assume the costs of cleanup.

CERCLA expresses a fundamental policy that those who are responsible for creating hazardous conditions, rather than the innocent public, should bear the costs of responding to those hazards. H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17 (1980). See *United States* v. *Aceto Agric. Chems.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 n.8 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). When a parent corporation steps beyond its role as the stockholder of a subsidiary and actually participates in the day-to-day operation of a sub-

sidiary and its facility, CERCLA dictates that the corporation should be responsible, together with other parties that owned or operated the facility, for the costs of cleanup.

The court of appeals' decision thwarts that congressional policy. It establishes a judicially created exception to Section 107(a)(2)'s liability standard that is contrary to the language of CERCLA and inconsistent with its goals. In ultimate effect, that exception would diminish the fairness of CERCLA's liability provisions, which subject parties to liability on the basis of their own actions and not on the basis of their corporate form. Particularly in light of the squarely conflicting holdings by other courts of appeals, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-2288, 92-2326

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN;
CORDOVA CHEMICAL COMPANY; AEROJET-GENERAL
CORPORATION (92-2288), DEFENDANTS-APPELLANTS

CPC INTERNATIONAL INC. (92-2326),
DEFENDANT-APPELLANT

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
DEFENDANT-APPELLEE

[Decided: May 13, 1997]

OPINION

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which KENNEDY, MILBURN, NELSON, BOGGS, SILER, and BATCHELDER, JJ., joined and in which MERRITT, J., joined as to Part III.C.3. MERRITT, J. (pp. [24a-32a]), delivered a separate opinion concurring in part and dissenting in part. RYAN, J. (pp. [32a-54a]), delivered a separate dissenting opinion in which MARTIN, C.J., DAUGHTREY, and MOORE, JJ., joined and in which MERRITT, J., joined as to Part I.

ALAN E. NORRIS, Circuit Judge.

This appeal highlights the difficulty that often attends the apportionment of liability for the clean-up costs of sites that have been subjected to long-term environmental degradation. In the present case, brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), the environmental damage occurred over a period of decades and during the watch of several owners.

A central concern on appeal is the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred on a site owned by a subsidiary. Because we adopt a stricter standard than did the district court for imposition of such liability, we reverse certain of its determinations and remand for further proceedings.

I. PROCEEDINGS BELOW

In May and June 1991, the district court conducted a fifteen-day bench trial to determine which parties were responsible for clean-up costs related to pollution of a site located in Dalton Township, Michigan. In addition to the live testimony of twenty-nine witnesses, the court received more than 2,300 exhibits and reviewed dozens of deposition transcripts. Given the complexity of the proceedings below, the factual findings contained in the district court's published opinion are extensive. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F.Supp. 549, 555-70 (W.D.

Mich. 1991). We summarize them here by way of background.

Beginning in 1957, a series of owners used the Dalton Township site to manufacture chemicals. The initial owner, the Ott Chemical Company ("Ott I"), controlled the site from 1957 until 1965. During this time, the groundwater flowing underneath the site became contaminated, a development confirmed by tests conducted in 1964.

Pollution of soil, surface water, and groundwater continued after the Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site in 1965. The use of unlined lagoons as a means of chemical waste disposal was the principal cause of the contamination. According to the district court, this practice spanned the period from 1959 until at least 1968.

See page from these lagoons did not, however, constitute the sole source of pollution that occurred during the ownership of Ott I and Ott II. Further contamination emanated from chemical spills from train cars, from chemical drums, from overflows of chemicals contained in a cement-lined equalization basin, and from other sources. Groundwater pollution did not go completely untreated during this time; from 1965 until 1974, purge wells were operated intermittently in an attempt to alleviate the problem.

In 1972, the Story Chemical Company ("Story") acquired the site from Ott II and continued to operate it until 1977, when bankruptcy ended operations. At that point, the trustee in bankruptcy assumed title to the site and attempted to find a buyer.

Active governmental response to the pollution problems at the site began in 1977, after Story's bankruptcy, when the Michigan Department of Natural Resources ("MDNR") visited the site to assess the situation. In view of the severity of the environmental problems and the lack of resources to pay for a cleanup, the MDNR became active in an effort to attract a purchaser who would participate financially in clean-up efforts. This search led to the signing of a document on October 13, 1977, by the Cordova Chemical Company ("Cordova/California"), a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), and the MDNR. The district court described the agreement and its aftermath:

> It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. . . .
>
> . . . .
>
> . . . MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.
>
> . . . .
>
> With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the [agreement] stated:
>
> . . . .

> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary. . . .
>
> . . . .
>
> However, the agreement did not provide for a total cleanup of the site's severe environmental problems. . . .
>
> In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.
>
> . . . Cordova/California and MDNR fulfilled their cleanup obligations under the [agreement].

CPC Int'l v. Aerojet-General, 777 F.Supp. at 564-67.

Having executed this document, Cordova/California purchased the site the following day from the Story bankruptcy trustee. Cordova Chemical Company of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, acquired ownership of the site in 1978. Cordova/Michigan retains ownership, although manufacturing operations at the site ceased in 1986.

The district court made the following observations regarding conditions at the site during the ownership of the Cordova companies:

> During their period of operations, [the companies] neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

Id. at 556. In short, although the preexisting groundwater contamination problem was not remedied during their ownership, the trial court concluded that neither Cordova/California nor Cordova/Michigan exacerbated the condition.[1]

The federal Environmental Protection Agency became involved in cleanup of the site in 1981. Since then, the EPA has formulated a long-term response to the environmental damage that has occurred at the site; the cost of this effort will run into the millions of dollars.

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[1] The district court noted that two hazardous chemicals—benzene and 1,2 dichloroethane—were found at the site and used during the Cordova period of ownership. *Id.* at 556, 579 n. 11. Although Cordova/Michigan, in an April 5, 1984 letter to the federal EPA, acknowledges generating small quantities of these materials for disposal, we find nothing in the record to support a finding that any additional release of hazardous substances occurred at the site during the Cordova period.

II. CERCLA LIABILITY

Section 107(a) of CERCLA lists the parties who are potentially liable for the clean-up costs of a polluted site.[2] 42 U.S.C. § 9607(a). For the purposes of this action, those parties include the present owner *and* operator of a facility from which there is a release of a hazardous substance, any prior owner *or* operator of a facility whose involvement coincided with disposal of a hazardous substance, and any person who arranged for the disposal or transport of hazardous waste from a facility. 42 U.S.C. § 9607(a)(1)-(3). The parties stipulated that the site is a "facility" as defined by CERCLA, that it contains "hazardous sub-

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[2] 42 U.S.C. § 9607(a) states, in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action. . . .

stances," that "releases" of hazardous substances have occurred and threaten to continue, and that CPC, the MDNR, Aerojet, Cordova/California, and Cordova/Michigan are "persons" as defined by the statute. *Id.* at 556.

Because courts that have been asked to render liability decisions in CERCLA actions frequently invoke the remedial purpose of the act, *e.g.*, *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084, 111 S. Ct. 957, 112 L.Ed.2d 1045 (1991), we will review that subject before considering the liability of those parties now before us.

Congress enacted CERCLA as a "remedial statute designed to protect and preserve public health and the environment." *Kayser-Roth*, 910 F.2d at 26; *accord Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241-42 (6th Cir. 1991) (reviewing this circuit's approach to CERCLA liability). Accordingly, courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals in the absence of specific congressional intent to the contrary. *Anspec*, 922 F.2d at 1247 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)).

It must be recognized, however, that it is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise. *See generally Shore Realty Corp.*, 759 F.2d at 1039-42 (discussing legislative history). As the district court

recognized, "some of CERCLA's provisions are vague and its legislative history sparse." *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 571; *accord Anspec*, 922 F.2d at 1247 (characterizing the legislative history as "scant"); *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221 ("[C]ongressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship.").

Courts would not be warranted, therefore, in pointing to the "remedial legislation" litany, *see generally* Norman J. Singer, 3 Southerland Statutory Construction § 60.01 (5th ed.1992) (the rule that remedial statutes should be liberally construed is "firmly established"); *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 868, 112 L.Ed.2d 969 (1991) (noting that 42 U.S.C. § 1983, as a remedial statute, should be liberally construed), as a reason for filling in the blanks left by this sketchy legislative history to impose liability under nearly every conceivable scenario. Thus, while the liability provisions concerning facility operators should be construed so that financial responsibility for clean-up operations falls upon those entities that contributed to the environmental problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. In fact, this court has pointed out that, "Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions *they created*." *Anspec*, 922 F.2d at 1247 (emphasis added).

In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to

those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions.

In its effort to discern the sweep of CERCLA liability, the district court concluded that:

> CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. . . .
>
> Accordingly, it seems that CERCLA's "owned or operated" language forges a *new, middle ground.* It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.

In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship

> between a parent and its wholly owned subsidiary does not.

CPC Int'l v. Aerojet-General, 777 F.Supp. at 573 (emphasis added).

On the basis of this "new, middle ground," the district court found both CPC and Aerojet liable as operators for the disposal of hazardous substances that occurred while their subsidiaries operated the site.

III. DISCUSSION

A. CPC

The district court reasoned that liability potentially could attach to CPC as a parent corporation in two ways: direct liability under CERCLA's "operator" language or by common law veil-piercing. Clearly, since the facility was titled in the subsidiary's name, CPC could be found liable as an owner *only* through veil piercing. The court determined that CPC was liable as an operator of the site for environmental damage that occurred during the ownership of Ott II; this liability was grounded in section 107(a)(2) of CERCLA, which renders "any person [liable] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). To reach this conclusion, the court necessarily had to hold CPC, as a parent corporation, accountable for the environmental conduct of its wholly owned subsidiary corporation, Ott II. And, because the court held CPC directly liable as an operator, it did not reach the question of whether

CPC was liable as an owner pursuant to the traditional common law doctrine of veil-piercing.

It is not at all clear from the district court's opinion whether the basis for finding parental liability as an operator under its "new, middle ground" is the actual operation of the subsidiary's business or, on the other hand, the exertion of power or influence through active participation in the subsidiary's business. Although they are used interchangeably in the district court's opinion, the two concepts are not interchangeable. If anything, the facts recited by the district court support liability under the latter standard but not under the former. This confusion underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress. We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of an undefined "new, middle ground."

Actually, another scenario occurs to us under which one could argue that a parent corporation should be deemed to have directly operated a facility owned by its subsidiary. At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary. However, this is not a theory of operator liability relied upon by the district court, or alluded to in its opinion.

CERCLA defines the "owner or operator" of an onshore facility as "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). When the facility has been conveyed to a unit of state or local government, the definition differs. It then includes "any person who owned, operated or otherwise controlled activities at such facility immediately [before the transfer to the governmental authority]." 42 U.S.C. § 9601(20)(A)(iii). It thus appears that the drafters of the statute distinguished an operator from a person who "otherwise controlled" a facility. When the owner of a facility contracts out the daily running of the operation to a third party, that party presumably attains operator status (and its attendant liability). However, when a parent corporation actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporations law, nothing in the definition just cited or in the rest of the statute indicates that the parent has assumed the role of operator.

Despite the definition of "owner or operator," several circuits, like the district court below, have determined that parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries. *See, e.g., Kayser-Roth*, 910 F.2d at 26-27; *Schiavone*, 79 F.3d at 255; *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied*, 506 U.S. 940, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992); *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 572-73.

While some may wish to extend the reach of CERCLA to maximize the impact of its remedies, nothing in the statute or its legislative history

warrants the invocation by courts of vague, expansive concepts, such as the district court's "new, middle ground," which threaten the efficacy of time-honored limited liability protections afforded by the corporate form. As the Court of Appeals for the Fifth Circuit has noted in this context, "[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir. 1990).

The district court's approach presents a number of problems. First, it replaces the relatively bright line provided by the traditional doctrine of piercing the corporate veil with a nebulous "control" test. When, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability? The indicia enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offer little guidance. Certainly, these activities are not grounds traditionally relied upon as warranting the disregard of separate corporate existences.

Second, the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites. The case before us illustrates this point. There is no dispute that the MDNR actively sought a private sector partner to take over and assist in the remediation of the site. Aerojet indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of the agreement with the MDNR and the use of subsidiaries.[3] To scuttle such sensible and legitimate precautions in favor of an unpredictable "control" test would actually contravene the public interest by discouraging businesses from being involved in such projects.

Accordingly, we reject the district court's "new, middle ground" as the basis for fixing operator liability and hold that where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met. In other words, under the circumstances of this case, whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.

Whether the circumstances in this case warrant a piercing of the corporate veil will be determined by state law. *See Anspec*, 922 F.2d at 1248. Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must

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[3] Although it does not affect our resolution of the liability issue, we note that these negotiations occurred before the enactment of CERCLA.

be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.30 (perm. ed. rev. vol. 1990); Stephen H. Schulman et al., Michigan Corporation Law & Practice § 3.9(c) (1991 Supp.); *Seasword v. Hilti, Inc.*, 449 Mich. 542, 548, 537 N.W.2d 221, 224 (1995) (corporate veil may be pierced where the subsidiary is a "mere instrumentality" of the parent and the separate corporate existence is used to subvert justice or cause result contrary to clearly overriding public policy); *see also Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111-12 (6th Cir. 1989) (surveying Michigan corporate veil-piercing decisions). Organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form. *Gledhill v. Fisher & Co.*, 272 Mich. 353, 359, 262 N.W. 371, 373 (Mich. 1935).[4]

The district court relied upon a number of factors in determining that CPC "actively participated in and exerted significant control over Ott II's business and decision-making" and was therefore directly liable under 42 U.S.C. § 9607(a)(2) as an operator:

[4] We do not conclude, as suggested by the dissent, "[t]hat piercing the corporate veil under Michigan law requires showing that the corporate form was used to 'subvert justice.'" Rather, it requires that the subsidiary be a "mere instrumentality" of the parent which is used *either* to subvert justice *or* to circumvent overriding public policy. In our view, none of these factors fairly characterize the relationship between CPC and Ott II.

100% ownership of Ott II; participation on Ott II's board of directors; a cross-pollination of officers who were involved in decision-making and daily operations; active participation by CPC officials in environmental matters; and financial control of Ott II through approval of budgets and capital expenditures. *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 575. While these factors reveal a parent that took an active interest in the affairs of its subsidiary, they do not indicate such a degree of control that the separate personalities of the two corporations ceased to exist and that CPC utilized the corporate form to perpetrate the kind of fraud or other culpable conduct required before a court can pierce the veil. While CERCLA contemplates allocating financial responsibility to those corporations that cause environmental degradation, it does not authorize assignment of liability to parent corporations that abide by the proper use of the corporate form.

In summary, then, it seems to us that under the "owned or operated" language of 42 U.S.C. § 9607(a)(2), there are three scenarios under which a parent corporation could be held liable for the disposal of hazardous substances at a facility whose owner of record was the parent's subsidiary corporation. First, as an owner, by piercing the corporate veil. Second, as an operator, where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary.[5] Although a parent conceivably could be

[5] Thus, the dissent's characterization of our opinion as holding "that a parent cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an 'operator' of a facility owned by its subsidiary corporation" is mistaken.

held liable under this theory, it is not the one relied upon by the district court, and, in any event, is not supported by the facts in the record before us.

Finally, operator liability may be based upon the conduct of the parent in the course of its affiliation with its subsidiary, including the degree of control exerted by the parent over its subsidiary. This is the scenario utilized by the district court, relying upon its "new, middle ground" standard to define the circumstances under which the parent will be liable. As pointed out above, we conclude that this "new, middle ground" is unworkable, and that traditional veil piercing is the only standard under which this scenario for liability can be assessed reliably.

Accordingly, the district court's finding of operator liability with respect to CPC must be reversed.

B. MDNR Liability

The district court rejected liability claims that were advanced against the MDNR on two fronts: as an operator and as an "arranger." Only the district court's decision regarding arranger liability is appealed.

CERCLA imposes liability on

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3).

It is contended that the MDNR incurred arranger liability when it negotiated with Cordova/California for the acquisition of the site and agreed with Cordova/California on a plan to clean up the groundwater contamination.

We agree with the district court's conclusion that the MDNR escapes liability because its actions were taken in response to the Act's environmental emergency provision:

> No state or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2). Our reading of the record indicates that the MDNR acted in good faith when attempting to address the groundwater contamination of the site. That its efforts proved to be less than entirely successful is unfortunate, but does not subject the agency to liability.[6]

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[6] We note that, since this case was briefed and argued, the Supreme Court decided *Seminole Tribe of Fla. v. Florida*, — U.S. ——, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which potentially provides the MDNR with an Eleventh Amendment defense. Because this issue has not been raised by the parties

C. Liability of Aerojet and its Subsidiaries

1. *Owner Liability*

The district court held both Aerojet and Cordova/Michigan liable as present owners of the site under CERCLA'S section 107(a)(1) which assigns liability to "the owner and operator of a . . . facility." 42 U.S.C. § 9607(a)(1). Cordova/Michigan does not challenge this decision on appeal and we therefore express no opinion with respect to its liability.

As for the parent corporation, Aerojet could be found liable as an owner only through veil piercing, since Cordova/Michigan was the owner of record. The district court appropriately looked to Michigan law to determine whether to pierce the corporate veil and, in its view, the evidence supported a conclusion that Aerojet had "totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary." *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 578. Accordingly, the court determined that it was appropriate to pierce the corporate veil. Among the grounds cited for its decision, the court highlighted the total ownership by the parent, Aerojet's active participation in the acquisition of the site, the timing of the incorporation of the subsidiaries, cross- pollination of corporate officers, financial control, and the integration of the businesses. *Id.* at 577.

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through supplemental briefs and the resolution of the case with respect to the MDNR is not affected, we choose not to consider the impact of *Seminole Tribe* at this point in the proceedings.

These facts, however, fall somewhat short of what is required to pierce the corporate veil under Michigan law. They do not establish that Cordova/Michigan was a mere instrumentality of Aerojet in the sense that the separate corporate personalities of the parent and subsidiary ceased to exist. More tellingly, they do not reveal activity by Aerojet that approaches the level of culpable conduct contemplated by Michigan law as a predicate to disregarding the separate corporate form. *Bodenhamer Bldg. Corp.*, 873 F.2d at 112. While Aerojet obviously sought to limit its liability for existing environmental problems through good faith negotiation with the MDNR and prudent use of the corporate form, there is nothing to suggest that the company acted to subvert justice or with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate form. Although Aerojet took an active interest in its subsidiaries, the record does not support a conclusion that Cordova/Michigan was not a viable corporate entity. Accordingly, the district court erred when it pierced the corporate veil to assign liability to Aerojet as an owner.

The district court also noted that Cordova/California actually owned the site from October 1977 until November 1978. Although the company began clean-up operations as required by its agreement with the MDNR, the district court found that additional releases of hazardous substances occurred during this period. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 579. It thus imposed liability on Cordova/California as a former owner pursuant to section 107(a)(2).

This conclusion, however, conflicts with the district court's summary of activity at the site during the ownership of the Cordova companies. *Id.* at 556. On remand, therefore, we ask the district court to indicate with greater specificity precisely which portions of the record it relies upon to support a finding that additional releases of hazardous substances occurred during Cordova/California's brief ownership. Absent such evidence, liability cannot attach to Cordova/California as a former owner of the site.

2. *Operator Liability*

Finally, we turn to the district court's alternative imposition of liability on Aerojet pursuant to section 107(a)(2), precisely the same basis for liability that we have already discussed, and rejected, with respect to CPC. Since we decline to adopt the "new, middle ground" control test utilized by the district court, no liability attaches unless the corporate veil can be pierced. And because the record does not support veil piercing, Aerojet cannot be held liable as an operator pursuant to section 107(a)(2).

3. *Defenses*

Upon remand, the district court should also revisit its treatment of the defense raised by Aerojet, Cordova/California, and Cordova/Michigan under section 107(b)(3). The pertinent part of the statute follows:

> [A] person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were *caused* solely by—

> . . . .
>
> (3) an act or omission of a third party other than . . . one whose act or omission occurs *in connection with* a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b) (emphasis added).

In parsing the exceptions to the defense, the district court noted that under 42 U.S.C. § 9601(35)(A), the term "contractual relationship" includes deeds transferring title. Thus, the district court concluded that a defense would be unavailable to a defendant who had a direct or indirect contractual relationship with the parties responsible for contaminating the site. *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 581. Under this view, the defense could not be invoked by any defendant who was a party to a deed with a polluter. The district court, however, ignored the requirement that, in order to render the defense inapplicable, the hazardous substance release must have resulted from the act of a third party "in connection with" the contractual relationship with the defendant. The "in connection with" language of the defense appears to have been designed to preclude

a person from escaping liability by contracting for a third party to do his dirty work for him.

As we pointed out above, from what we glean from the district court's recitation of facts, the release of hazardous substances appears to have been *caused* solely by the predecessors of these three defendants.

IV. CONCLUSION

For the foregoing reasons, the district court is **reversed** in part and **affirmed** in part and this cause is **remanded** to the district court for further proceedings consistent with this opinion.

MERRITT, Circuit Judge, concurring in part and dissenting in part.

I concur in part I of Judge Ryan's opinion, which would hold CPC International directly liable as an operator. I also concur in part III.C.3. of Judge Norris' opinion for the Court and support remanding the case for further findings regarding the Aerojet defendants' assertion of the "third-party" defense, CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3), and for further findings regarding whether or not disposal of hazardous substances occurred while the Aerojet defendants owned the site. Unlike Judges Ryan and Norris, however, I believe that federal common law governs the question of whether Cordova/California and Aerojet are liable as current owners pursuant to CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), rather than Michigan's doctrine of piercing the corporate veil. Since the district court improperly analyzed this question using Michigan state law, I would remand the case for further findings.

I. State Law v. Federal Common Law

Several of the parties argue that Cordova/Michigan, the nominal owner of the site, is an alter ego of Cordova/California and Aerojet and that Cordova/California and Aerojet should thus be held liable as owners under the doctrine of piercing the corporate veil. Resolution of this issue first requires deciding whether the question is governed by state law or federal common law.

It is well-established that actions arising under nationwide federal programs are governed by federal law. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979). But federal law can incorporate applicable state law doctrines in appropriate circumstances. *Id.* at 727-28, 99 S. Ct. at 1457-59. In *Kimbell Foods*, the Supreme Court enumerated the factors a court must consider in deciding whether to apply state law or federal common law. "[F]ederal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules," *id.* at 728, 99 S.Ct. at 1458 (quoting *United States v. Yazell*, 382 U.S. 341, 354, 86 S. Ct. 500, 507, 15 L.Ed.2d 404 (1966)), but courts must also consider "whether application of state law would frustrate specific objectives of the federal programs" and "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Id.*

Under the *Kimbell Foods* test, federal common law standards for piercing the corporate veil should be applied in CERCLA actions against parent cor-

porations. All three of the *Kimbell Foods* factors support using a uniform federal standard.

> In attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection. Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.

In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 675 F.Supp. 22, 31 (D. Mass. 1987).

Congress intended for CERCLA to cast a wide net of responsibility for the costs of environmental cleanup. Uniform national standards of liability are necessary to effectuate this goal. Following state law in this area would allow corporations to easily evade their environmental responsibilities under CERCLA by incorporating subsidiaries in states with stringent standards for piercing the corporate veil. *See* 126 Cong. Rec. H11787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio, CERCLA House sponsor) ("[t]o insure the development of a uniform rule of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area"). In addition,

states' interests in regulating corporations are strongest with respect to internal affairs of the corporation, and are less compelling with respect to external affairs such as shareholder liability to outside parties. *See* Henry Hansmann & Reinier Kraakman, *A Procedural Focus on Unlimited Shareholder Liability*, 106 Harv. L.Rev. 446, 450-53 (1992) (arguing that choice of law concerns do not bar unlimited shareholder liability in tort actions); Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L.Rev. 853, 862-63 (1982) (arguing that piercing the corporate veil relates to external affairs and should be governed by the law of the forum); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 621, 103 S.Ct. 2591, 2597, 77 L.Ed.2d 46 (1983) ("As a general matter, the law of the [country] of incorporation normally determines issues relating to the internal affairs of a corporation. . . . Different conflicts principles apply, however, where the rights of third parties external to the corporation are at issue." (citations omitted)).

Federal precedents support using a federal common law standard for piercing the corporate veil to determine parent corporation CERCLA liability. Although few circuit courts have considered the issue, *compare Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (applying federal common law) with *Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990) (affirming a district court opinion that declined to address the choice of law question on the grounds that the standard for piercing the corporate veil are the same under state and federal law), district

courts have overwhelmingly applied federal common law in this context. *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F.Supp. 1290, 1305 (W.D.N.Y. 1996); *Atlantic Richfield Company v. Blosenski*, 847 F.Supp. 1261, 1278 (E. D. Pa. 1994); *City of New York v. Exxon Corp.*, 112 B.R. 540, 552 (S.D.N.Y. 1990), *aff'd on other grounds*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 20 (D.R.I.1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990); *United States v. Nicolet, Inc.*, 712 F.Supp. 1193, 1201 (E.D. Pa.1989); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F.Supp. 22, 30-31 (D. Mass. 1987); *cf. Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F.Supp. 1542, 1545-46 (M.D. Fla. 1991) (applying Fifth Circuit standard without discussing the choice of law question), *aff'd on other grounds sub nom Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *United States v. Mottolo*, 695 F.Supp. 615, 624 (D.N.H. 1988) (holding parent corporation liable without piercing the corporate veil because "CERCLA places no importance on the corporate form").

Additional support for using a federal common law standard comes from cases involving successor corporation liability under CERCLA. Although this Court has previously relied on state law in that context, *see Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991), other circuits that have considered this issue have applied federal common law. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990);

Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988); *see also United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 487 n. 9 (8th Cir. 1992) (stating in dicta that federal common law should probably be applied).[1]

II. The Proper Federal Standard

Piercing the corporate veil is an equitable doctrine. "The federal common law in this area emerges from the general principle that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity.'" *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F.Supp. 22, 33 (D. Mass. 1987) (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir.1981)); *see also American Bell Inc. v. Federation of Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984) ("the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime"). Two elements are generally regarded to be essential to pierce the corporate veil: "First, the dominant corporation must have controlled the subservient corporation, and second, the dominant corporation must have proxi-

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[1] The Eleventh Circuit recently applied state law to determine the CERCLA liability of limited partners, *see Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996). That is not necessarily inconsistent with applying federal law in claims involving subsidiary corporations, however, since the danger of corporations creating subsidiary partnerships, as compared to subsidiary corporations, in order to evade CERCLA liability is fairly attenuated.

mately caused plaintiff harm through misuse of this control." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1103 (5th Cir. 1973).

Although some cases require a showing of fraud, *see, e.g., Edwards Co. v. Monogram Indus.*, 730 F.2d 977, 980-81 (5th Cir.1984), even jurisdictions that require such a showing in some circumstances often recognize that fraud is not always required. *See, e.g., United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 692-93 (5th Cir. 1985) (finding that fraud is not required to pierce the veil in tort cases even though fraud is required in contract cases). Courts applying federal common law have found that fraud is not required to pierce the corporate veil. *See, e.g., Valley Fin., Inc. v. United States*, 629 F.2d 162, 172 (D.C. Cir. 1980). Requiring a showing of fraud would be particularly inappropriate in CERCLA cases. The fraud requirement appears to arise from the equitable nature of the piercing doctrine. The public policy considerations underlying CERCLA, however, provide a sufficient equitable basis for piercing the corporate veil whether or not fraud has been shown. This conclusion is further supported by CERCLA's limited deference to corporate form. *See United States v. Mottolo*, 695 F.Supp. 615, 624 (D.N.H. 1988); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 23-24 (D.R.I. 1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990).

Similarly, the proximate cause element should not be required in CERCLA cases, because Congress has provided statutory liability criteria. If a CERCLA defendant is a potentially responsible party under

CERCLA § 107, 42 U.S.C. § 9607, then no further finding of proximate causation should be required.

The test for piercing the corporate veil under federal common law in CERCLA cases thus should be simply whether the parent corporation "controls or at the relevant time controlled the management and operations of the subsidiary." *United States v. Nicolet, Inc.*, 712 F.Supp. 1193, 1202 (E.D. Pa. 1989). Federal courts applying this standard in CERCLA cases have relied on one of two tests: a twelve-factor test set out in *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985); *see Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F.Supp. 1542, 1545 (M.D. Fla. 1991), *aff'd on other grounds sub nom Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *Joslyn Corp. v. T.L. James & Co.*, 696 F.Supp. 222, 227 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990); or a seven-factor test set out in *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F.Supp. 22, 33 (D. Mass. 1987); *see Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F.Supp. 1290, 1305 (W.D.N.Y. 1996); *City of New York v. Exxon Corp.*, 112 B.R. 540, 553 (S.D.N.Y. 1990), *aff'd on other grounds*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 20 (D.R.I. 1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990). These tests overlap, and neither list of factors is exhaustive. Piercing the corporate veil requires a fact-specific inquiry taking into account all of these factors and any other pertinent circumstances. The trier of fact must consider the totality of the circumstances to determine whether the parent controls or controlled the management and operations of the subsidiary.

Because the district court applied Michigan law rather than the proper federal common law standard for piercing the corporate veil, I would remand the case for further review under the proper standard.

RYAN, Circuit Judge, dissenting.

My colleagues' opinion today reaches three important and dispositive conclusions:

> That a parent corporation cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned by its subsidiary corporation, but may face only vicarious liability under state-law corporation-veil-piercing principles;
>
> That piercing the corporate veil under Michigan law requires circumstances showing that the corporate form was used to "subvert justice"; and
>
> That the district court erred in finding that the defendants failed to prove their entitlement to the so-called third-party defense under 42 U.S.C. § 9607(b)(3).

In my judgment, the court is mistaken on all three grounds, and I therefore respectfully dissent.

I.

Direct Liability of a CPC Under Section 107(a)(2)

A.

Parent Corporations as "Operators"

CERCLA identifies two distinct categories of individuals or entities that may be held directly liable,

as responsible parties, for the costs of cleanup of an environmentally contaminated facility:

> (1) the owner *and* operator of a vessel or a facility, [or]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of[.]

42 U.S.C. § 9607(a) (emphasis added). The parties have stipulated that the site is a "facility" as defined by CERCLA, and that the site contains "hazardous substances."

The terms "owner" and "operator," as used in section 107(a)(2), are defined in the statute as "any person owning or operating such facility," 42 U.S.C. § 9601(20)(A)(ii), a definition that is, at best, circular and unhelpful. At least one court has observed that "[t]he circularity strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings." *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988). Further, it is noteworthy that the definition of "owner" explicitly excludes one whose ownership interest is merely that of a stockholder and who does not participate in management of the facility, 42 U.S.C. § 9601(20)(A)(iii), suggesting that one who *does* participate in management is accordingly susceptible to liability, *see United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 n. 6 (1st Cir. 1990). Finally, "person" is defined expansively as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission,

political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). The breadth of this definition plainly leaves room for a parent corporation. *See Kayser-Roth*, 910 F.2d at 25 n. 5.

The first question presented by this appeal is whether a parent corporation may be considered an "operator" under section 107(a)(2) when its subsidiary is the "owner." The district court determined that a parent corporation may face potential liability as an operator of a contaminating facility because the plain language of section 107(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility. It is a conclusion with which I agree; indeed, it is a conclusion that the vast majority of circuits—eight out of nine considering the question—have reached as well. *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 673-74 (2d Cir. 1996); *Schiavone v. Pearce*, 79 F.3d 248, 253-55 (2d Cir. 1996); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 842 (3d Cir. 1994) (*en banc*); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1221-22 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993); *see Kaiser Aluminum and Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992); *Kayser-Roth Corp.*, 910 F.2d at 27; *see also United States v. TIC Investment Corp.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995), *cert. denied*, — U.S. ——, 117 S.Ct. 50, 136 L.Ed.2d 14 (1996); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992); *cf. Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994). *But see Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990).

My colleagues offer several reasons for parting company with this impressive wealth of authority. First, they argue that courts have relied on the so-called remedial purpose of CERCLA to justify their conclusion that CERCLA should be given an expansive meaning, including a meaning that admits of liability for parent corporations as operators. Certainly, the shibboleth "remedial purpose" is a weak basis for legal analysis and I do not find it necessary to resort to it. But what the majority sees as the logical second step to a rejection of the remedial-purpose litany, namely, its "adhere[nce] to the tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions," is, to put it mildly, a *non sequitur*. (Maj. op. at 578.) Implicit in the majority's chosen "tenet" is rejection of the universally accepted principle that liability under CERCLA is both strict, as well as joint and several. *See, e.g., Kayser-Roth*, 910 F.2d at 26; *FMC Corp.*, 29 F.3d at 835. Whether CERCLA's purpose is "remedial" or not, the sounder proposition, I think, is that liability attaches only to those entities whom Congress has singled out for liability. For the reasons set forth below, the statutory language leaves no room to doubt that Congress has singled out operators for liability, irrespective of their corporate form.

The majority is also critical of the district court's language that liability should be predicated on a "new,

middle ground," and contends that this choice of language makes it unclear "whether the [district court's] basis for finding parental liability as an operator . . . is the actual operation of the subsidiary's business or . . . the exertion of power or influence through active participation in the subsidiary's business." (Maj. op. at 579.) It may be that trial courts' inventive "new, middle ground" expression is more conferring than clarifying, but my colleagues' conclusion that the district court's *holding* "threaten[s] the efficacy of time-honored liability protections afforded by the corporate form," simply does not follow. And my colleagues' ultimate conclusion, that a parent can only be found liable "when the requirements necessary to pierce the corporate veil are met," contradicts the plain language of section 107(a)(2). Moreover, it is a conclusion that begs the question this case presents, which, under subsection (a)(2), is not whether a parent corporation may be held vicariously liable for abuse of its subsidiary's corporate form—clearly it may—but whether Congress has created *direct* liability if the facts show that the parent corporation was the actor actually operating a contaminating facility. Stated differently, the issue is whether Congress has excused a parent corporation that is *in fact* operating a contaminating facility from direct liability, simply because it is doing so in the name of a corporate subsidiary. The majority's belief that such an excuse may be found in the statute does not, for me, withstand close scrutiny.

The structure of the statute, on its face, requires a recognition that " 'owner' liability and 'operator' liability denote two separate concepts and hence re-

quire two separate standards for determining whether they apply." *Lansford-Coaldale*, 4 F.3d at 1220. " 'CERCLA's language . . . indicates an intent to hold a corporation liable for the environmental violations of its subsidiaries and sister corporations, if it is otherwise determined to have operated the facility in question.' " *Schiavone*, 79 F.3d at 255 (quoting *Lansford-Coaldale*, 4 F.3d at 1221 n. 11). As the *Kayser-Roth* court observed,

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability.

Kayser-Roth, 910 F.2d at 26; *see Schiavone*, 79 F.3d at 254. In short, direct CERCLA liability under subsection (a)(2) may be predicated on one's status as an owner or on one's status as an operator.

Alternatively, of course, a parent corporation may also be *derivatively* liable if circumstances warrant piercing the corporate veil in order to treat that parent corporation as an owner, when its subsidiary is in fact the owner. The majority opinion conflates and confounds the two types of liability, which are analytically distinct, and erroneously concludes that the latter is the exclusive basis for liability. *See Sidney S. Arst Co.*, 25 F.3d at 420; *cf. Schiavone*, 79 F.3d at 253. As a result, the majority's analysis founders on a perceived tension between the standard

of a derivative liability arising out of common-law principles of corporate law and the standard of direct liability arising out of an application of the statutory language of CERCLA. The tension is chimerical. The statute explicitly provides for distinct, direct operator liability, and "the basis for such operator liability is wholly independent of any liability on the part of" the subsidiary, *Schiavone*, 79 F.3d at 254; it is a direct liability that "stem[s] directly from [the parent's] control over the plant," that is, its own actions as an operator, *id.* The mere fact that *derivative* owner liability requires a veil-piercing analysis simply does not speak to the appropriate analysis of *direct* operator liability.

As previously alluded to, many courts have analyzed the issue of direct operator liability of a parent corporation. Most have followed the approach of *Kayser-Roth*, in which the court declared that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." 910 F.2d at 27. "This standard requires an investigation into the relationship between the parent and subsidiary, in order to reveal the requisite level of corporate involvement." *John S. Boyd*, 992 F.2d at 408. Thus, the degree of control required is "more . . . than simple ownership and the general authority or control that comes with it." *Certain Underwriters*, 90 F.3d at 674. In *Lansford-Coaldale*, 4 F.3d 1209, the court embraced the *Kayser-Roth* standard, emphasizing that "operator liability may be established even without evidence that a [parent] corporation controlled the environmental

decisions of an affiliated corporation as long as there exist other factors which sufficiently demonstrate pervasive control." *Id.* at 1222 n. 13. Similarly, in *Jacksonville Electric*, 996 F.2d 1107, the court agreed that the test for direct parent corporation liability as an operator was whether the parent " 'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.' "*Id.* at 1110 (citation omitted). As is clear from the language of these cases, and as the *Kayser-Roth* court emphasized, it would "obviously not [be] the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary." *Kayser-Roth*, 910 F.2d at 27; *see John S. Boyd*, 992 F.2d at 408.

Among the many courts that have recognized that a parent corporation may be directly liable as an operator under section 107(a)(2), there has been a difference of opinion "as to whether operator liability should be predicated on the actual control one corporation has over the other, or whether the corporation's capacity or authority to control is sufficient." *Lansford-Coaldale*, 4 F.3d at 1220. The minority view has been adopted by the Fourth and Ninth Circuits, which would hold a parent corporation directly liable as an operator not because the parent corporation actually controlled the subsidiary, but rather because it had the authority to do so. *See, e.g., Nurad*, 966 F.2d at 842; *Kaiser Aluminum*, 976 F.2d at 1341. Those courts have justified their test as "one which properly declines to absolve from

CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority by undertaking efforts at a cleanup." *Nurad*, 966 F.2d at 842.

This view, I think, goes too far, because it assigns liability to the parent corporations beyond that intended by Congress. But in holding, as the majority of circuits have, that a parent corporation may be liable when it actually operates the facility in question, a court simply faithfully interprets plain statutory language.

Only the Fifth Circuit has adopted the limited view of operator liability described in the majority opinion here, in which the corporate form of the alleged operator is dispositive. The *Joslyn* court framed its inquiry as being whether to "impose direct liability on parent corporation for the violations of their wholly owned subsidiaries." *Joslyn*, 893 F.2d at 81. This somewhat disingenuous framing of the question ignores the direct link contemplated by the majority of other courts that have discussed operator liability, and suggests that operator liability for parent corporations, like owner liability, would simply be another type of derivative liability, albeit of a less demanding nature than corporate-veil-piercing. The *Joslyn* court reasoned that because "CERCLA does not [explicitly] define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries," *id.* at 82, there can be no operator liability for parents in the absence of veil-piercing. This analysis completely misses the point, which is that since a parent corporation is certainly within the statutory definition of "person," the relevant

question is simply whether the particular corporation was, in fact, an operator of the facility in question. Thus, the *Joslyn* court's invitation to Congress to "extend liability to parent corporations" if it wishes to do so, *id.* at 83, is simply meaningless. It is obvious that CERCLA *does* extend liability to all corporations, including parent corporations, so long as they satisfy the statutory prerequisite that they be operators. I note, too, that another panel of the Fifth Circuit, in a case decided after *Joslyn*, observed in *dicta* that individual shareholders or officers could be held directly liable as an operator, when "they themselves actually participate in the wrongful conduct prohibited by the Act," and recognized that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991). The *Riverside* holding indicates, at a minimum, a reluctance within the Fifth Circuit to broadly apply *Joslyn*.

In sum, I conclude, as the district court did, that a parent corporation may be held directly liable as an operator of a contaminating facility under section 107(a)(2) if the facts of the case show that its domination and control of the subsidiary corporation ostensibly operating the facility is so pervasive that the parent is the operator in fact.

B.

CPC's Liability Under Section 107(a)(2)

In addition to generally repudiating the possibility of direct operator liability for parent corporations, which has been adopted in a majority of circuits con-

sidering the question, my colleagues have a factual dispute with the district court. That is, given my conclusion that CERCLA plainly contemplates the possibility of direct operator liability for parent corporations, the analysis necessarily turns to whether such liability is appropriately imposed here: whether CPC, as a factual matter, operated the facility. My colleagues acknowledge that, *arguendo*, "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary," liability would be appropriate, but they assert that this theory "is not the one relied upon by the district court and, in any event, is not supported by the facts in the record before us." (Maj. op. at 581.) This assertion simply belies the record and the district court's opinion, and further, it fails to recognize that our review on this point is limited to review for clear error. *Lansford-Coaldale*, 4 F.3d at 1219; *John S. Boyd*, 992 F.2d at 408; *Kayser-Roth*, 910 F.2d at 27.

The district court found that CPC, Ott II's parent corporation, so totally and completely controlled Ott II that CPC was the actual operator of the contaminating facility in Dalton Township, Michigan. There is an abundance of evidence in the record to support this factual finding, and in all events, not even my colleagues claim it is clearly erroneous. It follows, therefore, as the district court found, that CPC is directly liable under section 107(a)(2) as the operator of the site. I agree.

Section 107(a)(2) provides that a parent corporation is liable if it is the operator-in-fact of the facility as indicated by the extent of its domination and control of the subsidiary, the ostensible operator. The

district court pointed out that some of the factors relevant to deciding whether the parent is the operator-in-fact include considerations such as the parent corporation's involvement in the subsidiary's board of directors and daily operations, and the parent corporation's control over the subsidiary's policy making in areas such as personnel, finance, and waste disposal. Also relevant are the facts leading up to the subsidiary's origin and the reasons for its existence, and the parent's level of financial monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions.

The specific facts with regard to CPC, as found by the district court, are these:

From CPC's acquisition of Ott II in October 1965 through April 1966, all four directors on Ott II's board were CPC officers. Over the next three and one-half years, at least three of the eight board members were officers of CPC, and for the following two and one-half years, until CPC sold Ott II, CPC officials comprised the majority of the then eleven-director board. At all times during Ott II's existence, the chairman of its board was a high-level CPC executive, appointed by CPC's president. In addition, the managers of Ott II who exerted active control over the subsidiary's day-to-day activities also were officers of CPC. Arnold Ott, who had been chief executive officer of Ott I, continued as Ott II's chief executive officer until 1969, during which time he also was CPC's vice president for scientific research and president of CPC's development company, a subsidiary with oversight responsibility for several CPC subsidiaries including Ott II. In addition, James Eiszner, who had been Ott I's vice president of marketing, served as Ott

II's president from 1967 to 1970. During Eiszner's tenure with Ott II, he also served as vice president of CPC's development company, and eventually became CPC's chief executive officer. Moreover, Eiszner, in particular, was criticized during his tenure as an Ott II official for paying too much attention to his CPC responsibilities and not enough attention to Ott II. Beverly Warner served as Ott II's chief executive officer from 1970 until it was sold in 1972, at the same time serving as president of CPC's development company.

Not only did CPC participate in Ott II's environmental matters via the CPC's environmental affairs director, G.R.D. Williams, but it was instrumental in setting Ott II's environmental policies. For example, because Williams did not believe Ott II needed a biological waste treatment facility, Ott II officers abandoned presenting plans for such a facility at a meeting with the state of Michigan. Moreover, Williams repeatedly controlled the interaction between Ott II officials and state and federal regulators, and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F.Supp. 549, 561 (W.D. Mich. 1991). Finally, as the district court found, CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to Ott II in excess of $5 million, while assuming many of Ott II's existing loans. In addition, CPC commingled its funds with Ott II's funds. CPC also limited the amount of capital expenditures that Ott II could approve without further approval by CPC's board of directors. As to personnel matters, CPC repeatedly

participated in Ott II's labor negotiations with local unions.

Based on these and many other findings, the district court concluded that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 575. These findings are amply supported in the record. As I have said, my colleagues do not claim they are clearly erroneous. Accordingly, the district court's conclusion that CPC was directly liable under section 107(a)(2) as an operator should be affirmed.

II.

Aerojet's Liability Under Section 107(a)(1)

The district court found Aerojet liable as a present "owner" of a contaminated facility under section 107(a)(1). It did so after finding that the facts justified piercing the corporate veil that thinly shielded Cordova/Michigan from Aerojet. My colleagues hold that the district court erred because it misapplied Michigan law: "[The district court's findings do] not suggest that the company acted to subvert justice or with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate form." (Maj. op. at 582.)

While there is no question that fraudulent intent or a subversion of justice justifies piercing the corporate veil, there is ample authority under Michigan law for finding parent corporation liability through veil piercing for a less egregious reason, such as unjustified use of the corporate form. Indeed,

the Michigan Supreme Court has only recently restated the applicable rule:

> Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities. This presumption, often referred to as a "corporate veil," may be pierced only where an otherwise separate corporate existence has been used to "subvert justice or cause a result that [is] contrary to some other clearly overriding public policy." *More specifically, Michigan courts have generally required that a subsidiary must "become 'a mere instrumentality' of the parent" before its separate corporate existence will be disregarded.*

Seasword v. Hilti, Inc., 449 Mich. 542, 537 N.W.2d 221, 224 (1995) (emphasis added) (citations omitted); *see Wells v. Firestone Tire and Rubber Co.*, 421 Mich. 641, 364 N.W.2d 670, 675 (1984); *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 26 N.W.2d 757, 762-63 (1947); *Potter v. Michigan Bell Tel. Co.*, 246 Mich. 198, 224 N.W. 438, 439 (1929). But the most instructive language of *Seasword*, for purposes of this case, is in the court's illustrative listing of "relevant factors ... showing that a subsidiary is a 'mere instrumentality' of its parent":

> [T]he parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent's exclusive distributing arm, or the parent's revenues are entirely derived from sales by the subsidiary.

Seasword, 537 N.W.2d at 224 n. 10.

The coincidence between these hypothetical factors and the reality of Aerojet's relationship with its subsidiaries is, to put it mildly, striking. The district court found that Aerojet was the 100% shareholder of Cordova/California; that Cordova/California, in turn, was the sole shareholder of Cordova/Michigan; and that the boards of directors of Cordova/California and Cordova/Michigan were titular only, not even convening for meetings. At least twenty Aerojet officers simultaneously held the same or nearly identical positions in Cordova/California and Cordova/Michigan. Aerojet so completely controlled the finances of all companies that neither Cordova/California nor Cordova/Michigan were permitted to maintain separate bank accounts. In addition, there was evidence that Aerojet used Cordova/Michigan by transferring to Cordova/California millions in worthless debt owed to Aerojet by Cordova/Michigan, effectively canceling debt owed by Aerojet to Cordova/California. These findings are supported by the record and are not clearly erroneous. The evidence established that Cordova/Michigan operated as a "mere instrumentality" of Aerojet.

Even more compelling are the findings of the district court regarding Cordova/Michigan's corporate purpose. When Aerojet began negotiations with MDNR for the Dalton Township property, Aerojet negotiated side-by-side with its then-unincorporated division, Cordova. After Aerojet entered two short-term stipulations with MDNR, and merely eleven days before the sale was concluded, Aerojet incorporated Cordova as a wholly-owned subsidiary. Although Aerojet had initially drafted the stipulation and consent order with MDNR, it was "Cordova

Chemical Company" that actually signed the agreement. Then, in November 1978, with the remodeling of the facility complete and manufacturing about to begin, Cordova/California incorporated Cordova/Michigan, transferring to it Cordova/California's ownership of the facility. Despite the separate corporate form of Cordova/Michigan, throughout operations, Aerojet actively participated in negotiations with prospective buyers for the possible sale of the facility. Once Cordova/Michigan ceased operations at the site, it was Aerojet that took responsibility for leasing portions of the site to third parties. It is clear that Aerojet took pains to insulate itself from environmental liability for the situation they knew existed at the site. Aerojet admits as much in its brief:

> By using well-capitalized, non-fraudulent, separate corporate subsidiaries, such as Cordova/California and then Cordova/Michigan, Aerojet could justify an attempt to reclaim and make the waste Site productive without risking all of its corporate assets. A rule of law imposing enormous environmental liability on parent corporations whose subsidiary neither perpetrated a fraud nor contributed to actual contamination would result in contaminated waste sites being permanently abandoned as unproductive, orphan properties, because no rational corporate officer could support a decision to rehabilitate a contaminated site if such liability were unavoidable.

Thus, Aerojet admits that Cordova/Michigan was established solely as a facade, to avoid any legal obligation to pay for further environmental cleanup at

the site. Under Michigan law, its admission is sufficient to justify piercing the corporate veil. *See Potter*, 224 N.W. at 440. As Aerojet points out, it is possible that a refusal to allow a prospective purchaser of a contaminated site to avoid liability will result in a scarcity of willing buyers. Certainly, both EPA and MDNR have a substantial interest in locating conscientious purchasers, who are willing to reclaim environmentally corrupt facilities. However, there is no evidence that the Michigan courts would view this interest as an exception to the state's veil-piercing standard, especially in light of the competing interest in imposing environmental cleanup costs on private industry rather than on taxpayers. Congress certainly was not deterred by this argument, given its balancing of interests in favor of imposing liability on new owners. Moreover, Aerojet and the Cordovas are not blameless, as they would have the court believe. The district court found that the entities actively contributed to the contamination and then failed to take remedial action, despite knowledge that contamination was continuing to migrate.

Accordingly, the district court's conclusion that, by piercing the corporate veil, Aerojet may be held liable as an *owner* under 42 U.S.C. § 9607(a)(1) should be affirmed.

I further agree with the district court that Aerojet was directly liable as an *operator* under section 107(a)(2):

> In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and

pervasive control over the businesses of both Cordova/California and Cordova/Michigan.

As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.

Accordingly, the court concludes the [sic] Aerojet is directly liable as an operator under section 107(a)(2).

CPC Int'l, Inc., 777 F.Supp. at 580.

III.

Third-Party Defense Under Section 107(b)(3)

Finally, I do not agree that the district court should be required, upon remand, to "revisit its treatment of the [third-party] defense raised by Aerojet, Cordova/California, and Cordova/Michigan" under section 107(b)(3). (Maj. op. at 582-83.) To succeed under section 107(b)(3), the defendants are required to prove *all* four elements of a third-party defense, which are:

1. That they did not contribute to the contamination;

2. That they were not in a direct or indirect contractual relationship with any person who, in connection with the contractual relationship, caused the contamination;

3. That they exercised due care throughout their ownership or operation of the contaminating facility; and

4. That they protected against those acts and omissions of the polluting persons, and the consequences of those acts and omissions, that were foreseeable.

See 42 U.S.C. § 9607(b)(3); *see also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994).

The district court found that the defendants failed to carry their burden on all four elements of the section (b)(3) defense. My colleagues, in desiring that the district court "revisit its treatment of the defense" raised by the defendants, address only the "contractual relationship" ground. Even if the district court erred in its treatment of that element of the defense, its findings that the defendants have not carried their burden of proving the remaining three elements of the section 107(b)(3) defense, which my colleagues do not question, is amply supported in the record.

The district court committed no clear error in finding that the defendants demonstrated neither the exercise of due care nor the use of appropriate precautions. For example, in a May 1980 environmental risk report covering Aerojet and several subsidiaries including Cordova/Michigan, the defendants repeatedly stated their intent to take a

head-in-the-sand approach with respect to the contamination problem:

> The most significant environmental problems associated with the facility are those relating to the residues of past industrial occupants of the site. Management has adopted the position that any injury to others arising out of contamination from these residues is the responsibility of the State of Michigan Department of Natural Resources and that, accordingly, Cordova should insulate itself from any knowledge of, or involvement in monitoring these wastes.

The report went on to acknowledge that waste drums remained buried, despite completion of MDNR's removal efforts. Moreover, the report acknowledged that the stipulation entered into by Cordova and MDNR was never intended to resolve the contamination problem. In describing the responsibilities assumed by the parties under the stipulation, the report admitted that MDNR's duties were limited to removing 8700 drums and a portion of the contaminated soil and sludge, and that the stipulation's hold-harmless clause relieved the defendants only of liability arising out of these specified removal efforts. In addition, as the report acknowledged, the MDNR absolved the defendants of liability relating to procurement of an alternative community water source.

As the district court pointed out, and as the report confirms, the stipulation did not resolve responsibility for the remaining drums and contaminated soil and sludge, as well as responsibility for groundwater contamination. In this regard, the report specifically opined:

> Between 65 and 100 monitoring wells for testing groundwater were either installed by Story or have been installed more recently under a State/Federal study of groundwater contamination at the site. The study is being carried out by several consulting organizations under contract to the state. Cordova management believes the studies show little or no contamination but has avoided any participation or liaison with the study teams. . . . Because of the possibility that Cordova's potential liability for groundwater contamination may have survived the Consent Order, it would appear desirable for Cordova management to keep abreast of current monitoring results. In addition, although a high chloride content would show continuation of problems from the old Story wastes, a high sulphate concentration would indicate see page problems arising out of Cordova's current operations.

Fully aware that waste drums remained buried beneath the site and that the majority of the contaminated soil had not been removed, and cognizant of groundwater contamination to which they may have been contributing, the defendants believed the solution to these problems was to don blinders. Their willful blindness can hardly be characterized as the exercise of due care.

For the same reasons, it cannot be said that the defendants took adequate precautions to protect against the consequences of Ott II's and Story's omissions and acts. While the parties, in their briefs, debate whether reimplementation of the purge wells would have been an adequate precaution, they overlook the big picture. The defendants, fully aware that

contamination problems on their property were not being addressed, chose to take no precautions to protect against the foreseeable consequences of these problems—namely, further migration.

Accordingly, because the defendants have failed to prove at least two of the requisite elements of the third-party defense, the district court properly held that they were not entitled to invoke it. It is simply unnecessary to consider whether they sustained their burden regarding the remaining two elements, including whether any of the pollution was the act of a third party "in connection with" the contractual relationship with the defendants.

IV.

The judgment of the district court should be affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nos. G89-10503 CA, G89-961 CA

CPC INTERNATIONAL, INC., PLAINTIFF

v.

AEROJET-GENERAL CORPORATION

CORDOVA CHEMICAL COMPANY, CORDOVA CHEMICAL COMPANY OF MICHIGAN, AND MICHIGAN DEPARTMENT OF NATURAL RESOURCES, DEFENDANTS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN, CORDOVA CHEMICAL COMPANY OF CALIFORNIA, AEROJET-GENERAL CORPORATION, CPC INTERNATIONAL, INC., AND DR. ARNOLD C. OTT, DEFENDANTS

CPC INTERNATIONAL, INC., THIRD-PARTY PLAINTIFF

v.

COMMERCIAL UNION INSURANCE COMPANY, ET AL., THIRD-PARTY DEFENDANTS

[Filed: Aug. 27, 1991]

HILLMAN, Senior District Judge.

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I. INTRODUCTION

This consolidated action involves a series of claims brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (1988). The parties are litigating who must pay past and future costs incurred in the environmental cleanup of the soil, surface water and groundwater surrounding a dormant chemical manufacturing plant that has become one of the nation's most severely contaminated areas.

Following denial of summary judgment on liability issues,[1] the CERCLA liability phase of this case was tried before the court over 15 days in May and June 1991. This opinion sets forth the court's findings of fact and conclusions of law regarding CERCLA liability.

The parties participating in the liability phase were the United States; CPC International, Inc. ("CPC"); the Michigan Department of Natural Resources ("MDNR"); and Aerojet-General Corporation ("Aerojet"), along with its two wholly owned subsidiaries, Cordova Chemical Company and Cordova Chemical Company of Michigan (collectively, "the Cordova defendants").[2]

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[1] By prior order of the court, this case has been separated into three phases: liability, remedy and insurance coverage. *See* Order, November 14, 1990. The court denied nine dispositive motions filed with respect to liability. *See* Bench Opinion, February 4, 1991 & *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F.Supp. 1269 (W.D. Mich. 1991).

[2] The parties announced on the morning of trial that claims had been settled against another party, Arnold Ott. The court is currently awaiting presentation of a consent decree in

CPC, MDNR and the Cordova defendants each defended theories of liability advanced by the United States or other defendants under CERCLA's liability provisions in section 107(a) of the statute.[3] 42 U.S.C. § 9607(a). The court heard live testimony from 29 witnesses, received all or part of dozens of depositions, and admitted more than 2,300 trial exhibits. Following the trial, each party submitted proposed findings of fact and conclusions of law. On June 28, 1991, the parties delivered closing arguments.

After careful consideration of all the evidence and arguments set forth, the court makes the following findings of fact and conclusions of law on the issues of CERCLA liability, in accordance with Fed. R. Civ. P. 52(a).[4]

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accordance with CERCLA's settlement provisions, 42 U.S.C. § 9622 *et seq.*

[3] On April 30, 1991, the state filed a motion to dismiss based on eleventh amendment immunity all state-law claims brought against it by Aerojet, Cordova/California and Cordova/Michigan. On May 24, 1991, the court granted the motion in an opinion and order dismissing without prejudice claims for breach of contract, promissory estoppel, negligent misrepresentation and specific performance. *CPC, International, Inc. v. Aerojet-General Corp.*, 764 F.Supp. 479, 482 (W.D. Mich. 1991).

[4] CERCLA liability, when it attaches is joint and several unless a defendant proves that the harm is divisible. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F.Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361 (D.N.H. 1985). However, under a provision of CERCLA added by Congress in 1986, a potentially liable party may seek contribution from any other potentially liable party for a share of the response costs. 42 U.S.C. § 9613(f)(1). In allocating response costs in a contribu-

II. FINDINGS OF FACT

A. Background

1. Ownership

The site of contamination that is the subject of this litigation is located at 500 Agard Road in Dalton Township, Michigan, ("the site"), near Muskegon in a primarily rural area in the western part of the state. Groundwater underneath the site flows through

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tion action, a court has broad discretion to use equitable factors as it deems appropriate. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991).

In this case, the parties have advanced contribution claims against each other, seeking to reduce the amount of any liability that may attach. As previously indicated to the parties, the court is electing to defer until after the remedy phase findings of fact and conclusions of law with respect to allocation of liability. After the remedy phase, the court will have heard evidence regarding the extent of the harm caused by hazardous waste disposal as well as the cost of the remedy. At that time, the court will be able to reach an equitable decision regarding how cleanup costs should be allocated among liable parties.

Deferring allocation decisions until after the remedy phase is consistent with the legislative history of section 113(f)(1). The House Committee that drafted the provision stated, "*[A]fter all questions of liability and remedy have been resolved*, courts may consider any criteria relevant to determining whether there should be apportionment." H.R. 253(III), 99th Cong., 2d Sess. 19, (1985), *reprinted in* 1986 U.S.Code Cong. & Admin. News 3038, 3041-42 (emphasis added). *See also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667-68 (5th Cir. 1989) (favoring resolution of liability issues " before deciding the more complicated and technical questions of appropriate cleanup measures and the proportionate fault of liable parties").

an aquifer in a southeasterly direction toward two waterways, Little Bear Creek and the Unnamed Tributary.

From approximately 1959 to 1986, the site was used by a series of owners as a chemical manufacturing facility for the production of a variety of synthetic organic intermediate chemicals used for pharmaceutical, veterinary and agricultural purposes.

From 1957 to 1965, the site was owned and operated by the Ott Chemical Company, a Michigan corporation ("Ott I").

From 1965 to 1972, the site was owned and operated by a wholly owned subsidiary of CPC International, Inc. ("CPC")[5], known as Ott Chemical Company ("Ott II").

In 1972, Ott II sold the site to Story Chemical Company ("Story"), a Georgia corporation. Story owned and operated the site until it was adjudicated bankrupt in 1977.

In 1977, the Michigan Department of Natural Resources ("MDNR") initiated a regulatory investigation at the site aimed at determining the extent of environmental problems and possible remedies. As part of its efforts, MDNR tried to attract a new purchaser for the site who would participate in a cleanup of the site. As a result of these efforts MDNR entered into negotiations with Aerojet-General Corporation and its subsidiary, Cordova

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[5] After the events at issue in this case, Corn Products Company changed its name to CPC International, Inc. For simplicity, "CPC" will be used in all of the court's references to the company.

Chemical Company. These negotiations were fruitful and on October 13, 1977, Cordova Chemical Company ("Cordova/California") signed a "stipulation and consent order" with MDNR that set forth obligations with respect to efforts to remedy environmental contamination problems at the site. One day later, Cordova/California, a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), purchased the site from the Story bankruptcy trustee.

In 1978, Cordova Chemical Co. of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, became the owner of the site. Cordova/Michigan continues to own the site, but the facility has not been in operation since 1986.

2. Contamination

Prior to the commencement of chemical manufacturing at the site in 1957, the quality of the groundwater underneath the site was excellent.

By 1959, as a result of chemical waste disposal, the water pumped for use in the manufacturing process at the site had become contaminated. By 1964, test results showed that the groundwater flowing underneath the site had become contaminated.

As a result of chemical manufacturing and waste disposal practices at the chemical facility, the soil, surface water and groundwater at the site contain a large number of toxic chemicals.

The principal source of contamination at the site was the use of engineered, unlined lagoons at the northwestern edge of the site for chemical waste disposal. From 1959 to at least 1968, during the

Ott I and Ott II periods of ownership, wastewaters and other chemical waste used in the manufacturing process were discharged into the lagoons, where much of the contaminants seeped into the ground and water. No disposal into the lagoons occurred during the Story and Cordova periods.

During the Ott I and Ott II era, chemical waste also entered the ground through the burial and slitting of hundreds of drums in a sandy pit; numerous spills of hundreds of gallons of chemicals from train cars onto railroad tracks; frequent overflows of chemical waste at a cement-lined equalization basin; and the dumping into the woods of buckets of hazardous chemicals that had spilled during the manufacturing process. Some spills of hazardous waste also occurred during the Story and Cordova periods of ownership.

Contamination entering the ground from disposal in the lagoons or through spills then seeped into the ground and migrated away from the site via the aquifer to the southeast, ultimately reaching two waterways, Little Bear Creek and the Unnamed Tributary.

Beginning in 1965 during the Ott I period of ownership and continuing during the Ott II period, purge wells were used intermittently at the site in an attempt to treat the groundwater contamination and retard the spread of contamination away from the site.

However, after 1974 during the Story era of ownership and continuing through periods of ownership by Cordova/California and Cordova/Michigan, the purge wells were not operated for any significant time period, resulting in the continued, unchecked

spread of contamination away from the site through groundwater.

During their period of operations, Cordova/ Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/ Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

However, two hazardous chemicals used in small amounts by Cordova/Michigan—benzene and 1, 2 dichloroethane—are in the soil and groundwater at the site.

3. EPA's response

In 1981, the federal Environmental Protection Agency (EPA) began investigating how to remedy severe contamination problems in the ground and water at the site and surrounding area resulting from hazardous waste disposal practices at the site.

In 1982, the EPA placed the site and surrounding area on the federal government's National Priorities List of locations in need of a long-term remedial response. It is ranked 137th among this country's environmentally hazardous sites most in need of federal remedial action.

The EPA is presently continuing development of a three-phase, multi-million dollar remedial plan for the soil, surface water and groundwater at and surrounding the site.

This litigation consists of a series of consolidated claims regarding who should be liable for cleanup costs under CERCLA, 42 U.S.C. §§ 9607, 9613 *et seq.*

4. Stipulations

The parties have stipulated that the site is a "facility"; that the site contains "hazardous substances"; that "releases" have occurred and threaten to continue, as defined under CERCLA's relevant provisions; and that CPC, MDNR, Aerojet, Cordova/ California and Cordova/Michigan are "persons", as defined under CERCLA's relevant provisions, 42 U.S.C. § 9601.

B. Ownership by Ott I: 1957 to 1965

From 1957 to 1965, Ott I, a publicly traded Michigan corporation, owned and operated the site as a chemical manufacturing plant.

The company was steered by an active board of directors that was significantly involved in the management of the company. Ott I's board of directors made company decisions regarding policies, goals and directions in regular meetings which were commemorated in detailed minutes. During these meetings, the board conducted working sessions in which company officers presented comprehensive reports on the performance and activities of the various divisions.

Arnold Ott was the leading officer and director of Ott I. From the inception of Ott I in 1956 through its sale in 1965 to CPC, he served as president and chief executive officer of Ott I, and at various times served in other positions, including treasurer. He also served on the company's board of directors, which he chaired for a period of time. In addition, he was the company's largest shareholder, owning nearly 30 percent of its stock in July 1965, a time when the next largest shareholder owned only about 5 percent.

Another leading Ott I official was James Eiszner, a vice-president of marketing.

In 1963, Alexander McFarlane, CPC's chairman of the board, joined the Ott-I board. He soon became impressed by members of Ott I's management group, whom he admired for their dynamic, entrepreneurial spirit. McFarlane became interested in the possibility of tapping the scientific talent he had encountered to help CPC expand its primary business areas of corn wet-milling and consumer food products.

In the spring of 1965, McFarlane and Arnold Ott began to discuss the possibility of CPC acquiring Ott I. McFarlane was interested in bringing Ott I officials, particularly Ott and Eiszner, into the CPC management structure.

As a result of the discussions, McFarlane stepped down from the board of Ott I, and negotiations between top officials of Ott I and CPC followed in April and May 1965.

C. Ownership by Ott II: 1965 to 1972

1. Acquisition of Ott I

In June 1965, the Ott I board approved in principle an agreement and plan of reorganization for the purchase of the company by CPC.

The same month, Arnold Ott moved to New York and assumed responsibilities within CPC management. Ott initially worked with Harold Hellman, CPC's assistant to the chairman. Ott also continued to function as president, chief executive officer, and director of Ott I. Ott's move took place three months before the formal purchase of Ott I.

In September 1965, in preparation for closing on the sale, CPC created the Four Lakes Chemical Company, a wholly owned subsidiary incorporated in Delaware and capitalized with $1,000, for purposes of acquiring Ott I. The initial directors of Four Lakes were Arnold Ott and three CPC employees.

On September 22, 1965, the Four Lakes board of directs elected as its officers five people, including Ott and Eiszner, who had held identical positions with Ott I. The board also voted to change its name, effective October 1, 1965, from Four Lakes to the Ott Chemical Company ("Ott II")

Then on September 29, 1965, Ott I's assets and certain liabilities were sold to CPC's subsidiary Four Lakes, in exchange for 75,300 shares of CPC common stock.

Under the agreement, Four Lakes agreed to assume some specific liabilities of Ott I, with Ott I continuing to be responsible for those not designated.

Ott I expressly remained liable for "injury or damages to persons or property arising out of the sale of any goods, the provision of any services, or the conduct of" Ott I prior to closing. In addition, the agreement set forth that Ott I "expressly represents that it will pay, or make provision for the payment of, all liabilities and obligations of, or claims against Seller [Ott I] not expressly assumed" by CPC or Four Lakes.

The acquisition by CPC was publicized to customers, creditors, suppliers and the public.

After the sale, Ott I maintained public liability insurance for three years, but it ceased to operate as a functioning corporation. The company's name was changed to Muskegon Chemical Company.

On October 1, 1965, two days after the formal sale of Ott I, Four Lakes officially became the Ott Chemical Company ("Ott II").

Following the acquisition, Ott II functioned in a number of ways as Ott I had prior to the sale. The officers of Ott II remained identical to the officers of Ott I until March 1966. Ott II continued to use the name, "Ott Chemical Company." Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility.

CPC nevertheless planned rapid growth for Ott II. Prior to the sale, Arnold Ott reported to the Ott I board that McFarlane and CPC president Howard C. Harder "envisage the chemical operation to reach

at least $100,000,000 in five years." Following the acquisition, Ott II's production capacity significantly increased as CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons, which were expanded to accommodate the additional waste.

2. Board of directors

Following its acquisition of Ott II, CPC actively participated in, and at times controlled, the policy-making decisions of its subsidiary through its representation on the Ott II board of directors.

The Ott II board of directors was an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner. The board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal. These sessions sometimes lasted three to five hours. Far more than a rubber stamp for management, the Ott II board functioned as a major source of power and decision-making at the company.

CPC had majority control of the board for nearly three years. In the first six months following the acquisition, all four directors on the then four-member board were CPC officials, including Ott. Then, from March 1970 until the sale of the company to Story in June 1972, six of the eleven board members of Ott II were individuals with CPC positions. No

fewer than three CPC-affiliated directors served on the Ott II board at all times, and CPC, as 100- percent shareholder, controlled the selection of board members.

CPC directors serving on the Ott board reported back to CPC about Ott programs and gave approval on behalf of CPC for appropriation requests.

During CPC's entire period of ownership of Ott II, the chairman of the Ott II board was always a top-ranking CPC executive. The president of CPC had the authority to determine who served as Ott II's chairman. Arnold Ott served as chairman from 1966 to 1969 at the same time that he was a CPC vice-president and the president of CPC's development company. From 1969-1970, Eiszner was the Ott II chairman in addition to serving as a CPC vice-president. Finally, Beverly Warner served as chairman from 1970 to 1972 while also serving as president of CPC's development company.

Other CPC officials served as particularly influential members of the Ott II board. Within six months of the acquisition, CPC placed Harold Hellman, a CPC vice-president and assistant to CPC's president, on the board. James W. McKee, CPC's financial officer, served on the board from 1968 to 1969.

When the Ott II board expanded from eight to eleven members in 1970, the three additional directors were senior CPC employees, including Warner who was elected chairman and chief executive officer.

CPC executives who were not Ott II board members also occasionally attended Ott II board

meetings, including CPC's president and its chairman of the board.

CPC matters were discussed at board meetings, and Ott II board members recognized the need to consider CPC's interest and seek strong guidance from the parent company during these sessions.

The site of the Ott II board meetings regularly alternated between Ott II's headquarters in Muskegon and CPC's headquarters in New York and later Englewood Cliffs, New Jersey.

3. Management

CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest levels of the subsidiary's management.

Although Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC, CPC actively participated in this decision-making because high-ranking CPC officers served in Ott II management positions. In addition, the president of Ott II reported directly to CPC's president.

The Ott II management formulated and implemented the company's day-to-day operating policies, including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and environmental matters.

Several individuals served simultaneously as top-ranking Ott II and CPC officials. In some

instances, the officials with dual roles at Ott II and CPC worked out of CPC's headquarters in New York.

Arnold Ott was one of the principal CPC officials who exerted control within Ott II management. Following his move to CPC headquarters to assume new corporate responsibilities at CPC even prior to the formal acquisition of Ott I, Ott served as president and chief executive officer of Ott II through December 1966. During this period, Ott worked from CPC's headquarters where he served concurrently as a CPC vice-president responsible for scientific research. In 1968, Ott became the first president of CPC's development company, a division with oversight responsibility for Ott II and other wholly owned subsidiaries involved in scientific development. During his tenure as president of CPC's development company, Ott also served as Ott II's chief executive officer.

James Eiszner similarly held a major position at CPC at the same time that he was an active and influential member of Ott II's management. Eiszner served as Ott II's president from 1967 to 1970, and in 1968, he became a vice president of CPC's development company, reporting directly to its president, Arnold Ott. Eiszner subsequently ascended through the ranks of CPC, where he eventually became chief executive officer.

In another instance, a high-ranking CPC official became an Ott II senior officer. Beverly Warner, who became president of the development company in 1969, assumed the position of Ott II's chief executive officer in 1970, a position he retained until the sale of Ott II to Story in 1972.

CPC officials thus played decisive roles in Ott II's policy-making structure. As top officers at Ott II, these CPC officials exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel.

The direct involvement and influence of CPC officials in Ott II decision-making at times created controversy and strains within the subsidiary.

While serving as CPC's development company president and Ott II's chief executive officer, Beverly Warner controlled decisions including production, pricing and plant operations at Ott II actually undermined a number of Ott II programs. According to Eiszner, who eventually became CPC's chief executive officer, Warner "made some terrible, terrible management decisions which were probably what led" to the sale of Ott II in 1972.

Eiszner himself was the subject of criticism for improperly giving too much attention to CPC matters while serving in dual management roles at Ott II and CPC. At an Ott II board meeting, board members admonished Eiszner for improperly allocating too much management time to CPC.

The Ott II company airplane also was frequently unavailable for use by Ott II executives because CPC officials were occupying it for travel between their headquarters and the subsidiary.

Arnold Ott's control over Ott II matters continued even after he relinquished the Ott II presidency and served as CPC's development company president and Ott II chairman. For example, Ott singlehandedly

made the decision to move Gerald Roberts, Ott II's controller and treasurer since 1967, to a similar position with the CPC's development company in 1968. Ott also personally selected Roberts' successor at Ott II, David Hackney.

4. CPC's development company

CPC's development company also actively participated in and exerted control over policy-making at Ott II in efforts to enhance performance, shape decisions and affect personnel changes.

The development company, which had oversight responsibility for a number of CPC subsidiaries with scientific or technical specialties, served as another source of policy-making for Ott II. Prior to the closing of sale of Ott II to Story in 1972, Ott II president William T. White described to Story Chemical official Harry Forman: "Ott has been operating as part of the CPC Development Company, and, in addition, Ott has had its own Board of Directors. Thus . . . overall policy has come from two sources . . . ."

Arnold Ott and Beverly Warner served successively as president of the development company during the Ott II era, and each held positions as chief executive officer and chairman of Ott II during their respective tenures with the development company. James Eiszner served as vice-president of the development company.

The development company regularly reviewed Ott II and recommended changes on matters ranging from finances to personnel, exerting pressure to generate more profits and enhance performance. The company

sought to ensure that Ott II met profit plans and policy goals. It also decided, among other things, who would represent CPC on Ott II's board of directors.

Ott II submitted monthly financial reports to the development company and an annual financial prospectus known as the "green book" for review and approval. Top Ott II officers reported to development company officials as well as the Ott II board.

In addition, the development company conducted reviews of the subsidiary's performance that would be followed by calls for change within the subsidiary. For example, in December 1970, Arnold Ott and James Eiszner, who no longer held posts with Ott II, visited the subsidiary at Warner's request. In a December 21, 1970, memo to Warner summarizing the visit, Ott wrote, "No intent was made to be demeaning or critical, but rather to evoke constructive discussion on policy interpretation, goal definition, organization for achieving and means for directing and controlling the profit-generating process." The memo also stated that Ott and Eiszner had "admonished" the Ott II officers "to be more incisive and decisive, more frugal on authorizations of expenditures and to let all the personnel know—now—that the Company is off course and the team must win." After another review of Ott II, Arnold Ott took the unusual step of reporting the results to Warner in the form of a telegram sent to his home. It read, in part: "Am absolutely convinced that total financial capability [at Ott II] is grossly lacking. Sound fiscal management impossible. At present don't see plan to make profitable operations for first quarter of '71. Suggest replacing Hackney immediately as one element of remedy." David Hackney was subsequently replaced.

Other CPC officials engaged in similar missions to Ott II in which Ott II officials received instructions and directives on how to improve and change. Development company vice-president Kenneth W. Knief visited Ott II to discuss with Ott officials the accuracy of the subsidiary's profit plans shortly before CPC's sale of Ott II to Story. In a March 27, 1972, memo, following the visit, Knief wrote to Warner that Ott II management "had been advised not to implement any changes in activity without discussion with Englewood Cliffs," CPC's headquarters.

In sum, CPC engaged in active participation in and significant control over Ott II policy matters and decision-making both internally through representation within Ott II's management and board and externally through the supervision of CPC's development company.

5. Environmental matters

Along with its overall participation in Ott II policies through extensive involvement in Ott II's board and management and through active oversight by the development company, CPC actively participated in Ott II environmental matters.

Discussions of waste disposal problems and potential solutions was a major topic of discussion within the Ott II management structure and board that CPC at times dominated and controlled.

In addition, CPC became directly involved in environmental and regulatory matters through the work of G.R.D. Williams, CPC's governmental and environmental affairs director. Williams coordinated all pollution activities for CPC and its divisions and

subsidiaries and became heavily involved in environmental issues at Ott II.

At the suggestion of Ott board member and CPC executive Harold Hellman, Williams became involved with Ott II in 1966 when Ott II was considering waste disposal alternatives to be discussed at an upcoming meeting with the state Water Resources Commission. Hellman recommended involving Williams because he handled all CPC pollution problems and had dealt with similar waste disposal issues at another CPC subsidiary.

CPC's Williams then actively participated in and exerted control over a variety of Ott II environmental matters

In the meeting with the Water Resources Commission, Williams participated in discussions, which, as a result of his influence, did not include presentation by Ott II of plans for a biological waste treatment facility. Williams did not feel that Ott II should mention the option because he did not think it would be needed as a waste disposal alternative.

CPC's Williams also instructed Ott II officials to limit cooperation with state and federal regulators regarding waste disposal and to consult with CPC before responding to regulatory questionnaires or other inquiries. In a memo to a new Ott II vice-president for manufacturing in 1967, Ott II president Eiszner wrote that Williams "feels that delaying tactics are almost always advisable." In a 1968 memo to top-ranking Ott II officials, Williams instructed that any unannounced visit by regulators "should be stalled for advice from N.Y." and that "[a]ny questionnaires should be filled in promptly in pencil

and forwarded to Air & Water Programs for review and decision on reply." In a 1969 memo to an Ott II project engineer regarding an upcoming visit by a state regulator, Williams wrote, "As you know, it is our posture to be cooperative on the occasion of such inspections. We answer questions that are not self-incriminating, but we do not volunteer information, particularly about planned capital expenditures, production rates, sales volume and the like." In a 1971 memo regarding an upcoming federal survey to be completed by Ott II plant chemists, Williams instructed that if test results "meet acceptable levels, then the survey should be completed and forwarded by the plant manager. If they do not for any reason meet such levels, then this office should be queried with the details before the survey request is answered."

Other CPC officials also actively participated in Ott II waste disposal matters. For example, in 1970, Hanes Heller, a CPC attorney, negotiated with the state regarding Ott II's use of a county wastewater treatment system. Heller provided detailed instructions to Ott II regarding the objectives in these negotiations and indicated that CPC approval of any agreement was necessary.

6. Financial matters

CPC also exerted significant control over Ott II's finances.

Ott II prepared monthly financial reports for CPC's development company, and each year the subsidiary submitted a detailed financial plan known as the "green book" for review and approval by the parent company.

CPC functioned as Ott II's banker, advancing the subsidiary more than $5 million from 1965 to 1971. CPC also assumed a number of loans for Ott II. Ott II's funds were commingled with CPC's in a joint account.

In addition, Ott II had a limit on capital expenditures that were permitted without approval from CPC's board of directors or development company. The ceiling on capital spending that did not require parent approval was initially $5,000 in 1965 and became $200,000 in 1968.

7. Labor matters

CPC officials also actively participated in some Ott II labor matters.

In 1967, CPC officials became involved in the negotiations between Ott II and a union that had previously attempted to organize at other CPC facilities.

CPC also participated in subsequent labor negotiations in 1968 and 1970.

8. Other business matters

CPC also participated in other aspects of Ott II's business. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II.

9. Sale of Ott II to Story

On June 9, 1972, CPC sold Ott II to Story for approximately $6.6 million in cash and a $4 million note. The transaction was made without the knowledge of the Ott II board. For six months prior to the closing, CPC operated the Ott II business for Story. Following the sale to Story, Ott II changed its name back to Four Lakes Chemical Company.

D. Ownership by Story: 1972 to 1977

On June 9, 1972, Story began its chemical manufacturing operations at the site.

By 1974, beset by financial problems, Story abandoned regular use of the purge well system installed during the Ott II era to eliminate contaminants from the groundwater. This abandonment increased the spread of contamination migrating away from the site.

In July 1976, Story filed for bankruptcy organization, and in August 1977, the company was adjudicated bankrupt.

The bankruptcy trustee responsible for the disposition of Story's assets, Maurice Edelman, assumed title on the site and attempted to find a buyer.

E. Agreement between MDNR and Cordova/ California: 1977

1. MDNR's environmental emergency

Following Story's bankruptcy in 1977, officials with the State of Michigan began to assess the severe environmental problems presented by the abandonment of the site.

Acting in their regulatory capacity, MDNR officials, together with members of the Governor's office, Public Health Department, and State Police, visited the site and discovered the extreme severity of its environmental problems.

The site's environmental problems were legion. The toll exacted by decades of hazardous waste contamination was abundantly clear. Groundwater pumped to the surface contained foam and a brownish color like root beer. The stench of chemicals permeated the air. Soil excavation revealed the taint of toxic pollution, showing purplish colors. Hundreds of chemical drums, many piled atop each other, lay around the site, randomly strewn among trees, across pavement and into sandy pits. Many of the drums and barrels were crushed, corroded and leaking, with their contents seeping into the ground. Chemical waste by-products, including thousands of broken bottles, littered the land.

Among the chemicals found at the site were potentially deadly toxics. Tanks of explosive phosgene gas, potentially deadly if released into the air, presented a serious risk to neighboring residents in the event of vandalism or an accident. Other chemicals known as probable human carcinogens

were found scattered around the site, including benzene, phenol, methylene chloride, and methyl isocyanate.

Based on these discoveries, MDNR identified five severe environmental problems at the site. The five problems were prioritized in their order of immediate danger to public health: 1) the potentially explosive phosgene gas contained in large tanks at the site; 2) a contaminated water supply in the community surrounding the site; 3) contaminated sludges at the site; 4) contaminated waste containers at the site, particularly barrels and laboratory bottles; and 5) contaminated groundwater flowing underneath the site.

Although the environmental problems at the site did not qualify as a public health emergency under state fire or public health department standards, these dire environmental conditions presented an environmental emergency for MDNR. All of these severe environmental problems were going unattended and threatened to worsen, including the spread of some of the worst groundwater contamination state regulators have encountered to date. As a result, the site posed an environmental emergency in need of prompt regulatory attention from MDNR as the state agency responsible for the protection and conservation of Michigan's natural resources.

MDNR's ability to initiate an immediate cleanup of the environmental emergency at the site was severely limited, however. In 1977, Michigan and the United States had not yet established laws creating revolving funds to provide resources to pay for agency cleanups and liability provisions to seek reimbursement from polluters, such as CERCLA and its

Michigan counterpart, "Act 307", M.C.L.A. § 299.601 *et seq.* Instead, in order to initiate cleanup of an environmentally contaminated site, MDNR needed to obtain a specific legislative appropriation for that purpose. The tools for government cleanups in Michigan were few, and the process for obtaining them was laborious.

In light of the severity of the environmental problems at the site and the unavailability of immediate resources to pay for a cleanup, MDNR, together with other state officials, initiated in early 1977 an effort to expedite legislation appropriating funds for cleanup of the site.

At the same time, MDNR became actively involved in efforts to attract a buyer for the site. The agency was interested in involving a new purchaser in the cleanup as a way of reducing the amount of state money that would be allocated by the legislature for its regulatory response.

2. Negotiations between MDNR and Aerojet's Cordova Chemical Co.

In March 1977, officials from Aerojet and its unincorporated division known as Cordova Chemical Company met with MDNR officials in Michigan to discuss possible purchase of the site. After the meeting, Aerojet elected not to acquire the property, due, in part, to its contamination problems.

Several months later, however, Aerojet had renewed interest in the site. Aerojet was looking for a facility to make ethelenimine ("EI"), a chemical used by its Cordova division in the manufacturing process. Aerojet had recently learned that EI would

soon not be available from its previous supplier. As a result, talks between officials from MDNR and Aerojet resumed.

Discussion of the existence and spread of contamination at the site was central to the negotiations between MDNR and Aerojet. MDNR had initially aimed to have its regulatory cleanup of the five environmental problems funded entirely by the site's new purchaser. In contrast, Aerojet was initially reluctant to pay for the cleanup of any contamination created by prior owners of the site.

The negotiations over the contamination focused on identifying aspects of MDNR's regulatory cleanup efforts at the site that the company would agree to finance. MDNR decided that receiving private funding for some of its cleanup efforts would be acceptable, and Aerojet determined that it would be willing to pay for some cleanup of the preexisting contamination at the site in exchange for promises with respect to future cleanup obligations.

With negotiations progressing, Aerojet signed a stipulation with Story's bankruptcy trustee on September 12, 1977, in which Aerojet agreed to pay for security and safety measures at the site for the succeeding two weeks in exchange for the right to match any offers to purchase the site during the time period. On September 29, 1977, Aerojet signed a similar agreement for two additional weeks.

On October 3, 1977, in anticipation of an imminent agreement to purchase the site, Aerojet incorporated its Cordova division. Cordova Chemical Company ("Cordova/California") became a wholly owned subsidiary of Aerojet, incorporated in California.

After Cordova/California's incorporation, negotiations over the purchase of the site between MDNR and Cordova/California culminated.

3. The stipulation and consent order

On October 13, 1977, a document entitled "stipulation and consent order" was signed by MDNR, Michigan's attorney general's office and Cordova/California. It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. The document was not a formal stipulation and consent order that received court approval or settled pending litigation.

One day later, Cordova/California formally purchased Story's assets, including the site, from the bankruptcy trustee for $50,000 and the assumption of certain debts, subject "to all liens, claims and encumbrances" on an "as is," "where is" basis. In total, Cordova/California paid about $2.5 million for the site, which had been appraised by the State of Michigan as being worth approximately $7.5 million.

The four-page stipulation and consent order set forth the entire agreement between MDNR and Cordova/California with respect to the contamination at the site and obligations between the parties for cleanup. It contained eight stipulated facts and nine terms and conditions.

The stipulated facts in the document recited the five pollution problems identified by MDNR in its initial assessment of the environmental emergency left after the Story bankruptcy, although they were not enumerated as such: groundwater contamination;

buried waste sludge; toxic waste drums and containers; water supply problems caused by contaminated residential wells; and phosgene gas.

With respect to the groundwater problem, the stipulated facts stated that:

> . . . Groundwater beneath and surrounding Story Chemical Corporation for an unknown distance has been and is continuing to be contaminated with toxic chemical wastes which originated at the Story Chemical Corporation facility . . . .
>
> . . . Toxic chemical wastes in the groundwater from Story Chemical Corporation are moving away from the property of the Corporation and may thereby also contaminate nearby surface waters of the State of Michigan.
>
> . . . There is continued leaching of toxic chemical wastes to the groundwaters of the State of Michigan as a result of the improperly disposed waste sludges buried on the site of Story Chemical Corporation.

Stipulation ¶¶ 1, 3 5.

The stipulated facts also set forth "the most reasonable methods of abating the present pollution problems" at the site:

a) Disposal of the approximately 8,700 fifty-five gallon drums of solid and liquid chemical waste by the Department of Natural Resources by means of recovery, incineration or landfilling,

b) Excavation, removal and disposal of approximately 8,000 cubic yards of solid chemical waste, sludges and contaminated soils by the Department of Natural Resources, and

c) Neutralization, or sale, removal and disposal of the phosgene by Cordova Chemical Company.

Stipulation, ¶ 8. The "most reasonable methods of abating the present pollution problems" did not mention or address the groundwater or water supply problems.

The latter half of the document was entitled "consent order", and it set forth terms and conditions agreed to by MDNR and Cordova/California. Under the consent order, MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.

MDNR expressly agreed, at its sole cost and expense, to "completely remove the approximately 8700 fifty-five gallon drums from the Story Chemical Corporation facility and dispose of such drums and their contents. . . ." Consent order, ¶ 2. MDNR also expressly agreed, at its sole cost and expense, to "completely excavate and remove the approximately 8000 cubic yards of solid chemical wastes, sludges and contaminated soils. . . . [and] replace the excavated materials with clean fill." Consent order, ¶ 3.

Cordova/California expressly agreed, at its sole cost and expense, to "neutralize and dispose and/or

sell and remove all phosgene presently stored on the Story Chemical Corporation property. . . ." Consent order, ¶ 4.

Cordova/California also agreed to pay $600,000 to MDNR "to abate the pollution problems at the Story Chemical property. . . ." Consent order, ¶ 5. The order set forth a schedule for the payments and made them contingent upon MDNR obtaining legislative and gubernatorial approval.

With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the consent order stated:

> 6. It is anticipated that said $600,000 will be sufficient to reimburse the Department of Natural Resources fully for all costs and expenses incurred by it in connection with its obligations hereunder and, in addition, to provide at least $100,000 towards the provision of an alternative water supply system to serve residents and commercial establishments whose water supply wells are or may become affected by the groundwater contaminants emanating from the Story Chemical Corporation property. The Cordova Chemical Company shall not have any liability in the event that said $600,000 is not in fact sufficient for the intended purposes nor shall it have any responsibility whatsoever in connection with the provision of any water supply system or potable water pending availability of an acceptable water supply system to said residents and commercial establishments.

> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation, the creation, maintenance and operation of any purge wells.
>
> . . . .
>
> 8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwater or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order, whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.
>
> 9. By entering this Order the Department of Natural Resources agrees to indemnify and hold Cordova Chemical Company Harmless from any and all losses, damages, injury, costs and expenses (including reasonable attorney's fees) incurred or sustained by Cordova Chemical Company on account of or in connection with the Department's excavation, removal and disposal operations pursuant to paragraphs 2 and 3 of this Consent Order. This provision does not

apply to losses, damages, injuries, costs and expenses caused by the willful or negligent acts of Cordova Chemical Company's employees or agents.

Consent order, ¶¶ 6, 8, 9.

In sum, as a result of the negotiations that resulted in the terms and conditions of the stipulation and consent order, MDNR secured assistance and financing from Cordova/California in its regulatory effort to remedy the severe environmental problems at the site. Specifically, Cordova/California agreed to remedy the phosgene problem itself and provide $600,000 to pay for or subsidize MDNR's removal of 8,700 drums, the excavation and removal of 8,000 cubic yards of contaminated soils, and effort to remedy the water supply problem.

However, the agreement did not provide for a total cleanup of the site's severe environmental problems. Some aspects of MDNR's ongoing regulatory efforts at the site were not covered by the terms and conditions of the agreement.

In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.

In addition, the stipulation and consent order did not provide for removal of all of the site's contaminated sludge. MDNR had determined that the actual quantity of contaminated soil was 71,000 cubic yards, although the stipulation and consent order only proved for removal of 8,000 yards.

Thus, the cleanup responsibilities set forth in the stipulation and consent order were not sufficient to effectuate a total cleanup at the site. The piecemeal nature of the cleanup agreements caused some consternation among MDNR staff. But agency officials had determined that it was desirable to reach an agreement that would secure some assistance and financial support from the site's new owner as the MDNR began its initial regulatory activities.

After the signing of the stipulation and consent order, MDNR obtained a legislative appropriation to pay for the cleanup. On February 6, 1978, Michigan's Governor William Milliken signed a bill appropriating $1.27 million in funds for MDNR's cleanup of the site.

The appropriation consisted of $670,000 of state money and $600,000 paid to MDNR by Cordova/California under the consent order. The bill allocated $500,000 for "barrel and sludge removal", $600,000 for "alternative water supply" and $170,000 for "new ground water purging system."

Although the bill did not allocate money for a total cleanup, the appropriation contained funding for MDNR regulatory cleanup activities at the site that were not part of the agency's express obligations under the stipulation and consent order. Specifically, the allocation of $170,000 for groundwater purging was not related to any obligations set forth in the stipulation and consent order. Instead, the $170,000 allocation for the purging system funded MDNR's own regulatory effort to begin the cleanup of groundwater contamination. The $170,000 was requested by MDNR to pay for the design, installation and first-year of operation of a purge well system.

Several legislative and gubernatorial aides who became involved in passage of the appropriations bill did not understand that MDNR was requesting funding for regulatory activities at the site that were outside of the obligations made under the stipulation and consent order. The aides had not participated in the negotiations between MDNR and Cordova/California. They also did not understand that the appropriations would not effectuate a total cleanup of the site. This lack of knowledge about the cleanup led to the drafting of three documents that contained erroneous information: a letter drafted for Governor Milliken stating that the $1.27 million bill would pay for a "total cleanup" and two legislative fiscal analyses that implied that the stipulation and consent order obligated MDNR to install a groundwater purging system by MDNR. Trial exhibits 1028, 1027, 1059.

Following passage of the bill, Cordova/California and MDNR fulfilled their cleanup obligations under the stipulation and consent order. Cordova/California neutralized and removed the phosgene gas at the site. MDNR, with private contractors, removed 8,000 cubic yards of sludge and 8,700 drums of waste.

During its cleanup activities, MDNR discovered additional drums that had been buried by previous owners and not previously identified by the state in its investigation. One of the drums exploded during excavation work. MDNR did not have funds appropriated to pay for this additional cleanup. As a result, the drums were reburied as a precautionary measure until funding for their removal could be obtained.

MDNR's attempts to address the groundwater contamination problem continued. In an April 3, 1978, "special program directive", an MDNR official, designated as a "highest" priority the task of "removal of contaminated groundwater and installation of public water supply" at the site.

MDNR subsequently commissioned studies in an attempt to determine the most effective plan for eliminating contaminated groundwater. The studies aimed to analyze the extent of the problem and the flow of groundwater in order to place purge wells in locations that would most effectively control and recapture spreading contamination. Based on the studies, MDNR determined that an effective groundwater purging system might cost $37.7 million.

In its efforts to determine the most effective way to implement a purge system, the state expended the $170,000 it had been allocated for the new purging system. As a result, MDNR was not able to initiate any actual purging operations with the appropriations.

Following MDNR's and Cordova/California's fulfillment of their cleanup obligations under the stipulation and consent order, contamination remained at the site. Groundwater contamination continued to migrate. Thousands of yards of contaminated sludge remained in the ground and continued to leech. The recently discovered barrels also remained.

F. Ownership by Cordova/California and Cordova/Michigan: Since 1977

1. Acquisition of the site

Aerojet was actively involved in Cordova/California's acquisition of the site.

A team of Aerojet officials led the initial negotiations with MDNR in March 1977. One Aerojet individual was the company's director of risk management, and another was the vice president of operations for the Cordova division.

When negotiations resumed after the Cordova division learned it would be losing its principal supplier of ethelenimine, it was Aerojet officials again who became involved. Aerojet officials and employees conducted economic, environmental, and engineering studies regarding the site to determine its compatibility with the Cordova division. Aerojet's chief negotiators were its Cordova division's controller and vice president of operations.

In addition to signing two consecutive stipulations with the bankruptcy trustee giving the company the right of first refusal to purchase the site for a two-week period, Aerojet officials drafted an initial stipulation and consent order that it presented to MDNR shortly before the incorporation of Cordova/California.

2. Incorporation of Cordova/California, Cordova/Michigan

At two significant junctures in the history of ownership of the site, Aerojet incorporated a wholly owned subsidiary to take title of the property.

Aerojet incorporated its Cordova division as Cordova/California in October 1977, just before acquisition of the site. Then, shortly before the commencement of its chemical manufacturing at the site, Aerojet incorporated Cordova/Michigan as a wholly owned subsidiary of Cordova/California.

On October 3, 1977, just eleven days before the formal purchase of the site, Aerojet incorporated its Cordova division as a wholly owned subsidiary, Cordova/California. Cordova/California was capitalized by Aerojet with $10,000 in common stock and $7.1 million in addition paid-in capital. As a result, a subsidiary of Aerojet, rather than Aerojet itself, purchased the site.

Despite the change in form, the company officials participating in the acquisition remained the same during the final stages of negotiation. Richard Swanson, Marshall Howes, and T.J. Glad, formerly the negotiators on behalf of Aerojet's Cordova division, represented Cordova/California. This sudden change in corporate form resulted in some confusion within the company. Swanson, who signed the consent order on behalf of "Cordova Chemical Company", did not know whether he signed the document on behalf of the Cordova division or Cordova/California.

After its incorporation and acquisition of the site in October 1977, Cordova/California began a major

construction project to convert the facilities into a manufacturing plant for EI, the chemical which Aerojet's Cordova division had received from an outside supplier.

Then, on November 2, 1978, with construction complete and manufacturing operations about to begin, Cordova/California created its own wholly owned subsidiary, Cordova Chemical Company of Michigan ("Cordova/Michigan"), and transferred ownership of the site to Cordova/Michigan. Cordova/Michigan was capitalized by Cordova/California with $250,000 in common stock and $2.8 million in additional paid-in capital.

As a result, a subsidiary of Aerojet's subsidiary, rather than Aerojet's subsidiary itself, owned the site at the time that chemical manufacturing commenced.

3. Aerojet's direct involvement with the site

After the incorporation of each of its two subsidiaries for operations of the site, Aerojet continued to participate directly in decision-making regarding use of the facility.

In 1978, Aerojet closely supervised the construction of additional facilities at the site that were necessary for the conversion to a manufacturing plant for ethelenimine.

From 1979 until at least 1984, Aerojet participated in periodic discussions and negotiations with prospective purchasers regarding possible sale of the site. An Aerojet vice-president of corporate development served as the companies' designated individual for meetings with prospective purchasers.

In November 1979, one year after the incorporation of Cordova/Michigan, Aerojet prepared a prospectus for review by a West German company considering acquisition of the site.

After production activities at the site ceased in 1985, Aerojet participated in the continuing management of the site and leased portions of the site to third parties. Cordova/Michigan's manager of the Muskegon site reported directly to Aerojet officials working in an unincorporated division, Aerojet Investments. The manager's budget was approved by Aerojet.

4. Integration of business

Despite their separate corporate existence, Cordova/California and Cordova/Michigan operated as a single, integrated business entity. The subsidiaries performed functions that previously had been part of the operations of Aerojet's own Cordova division prior to the incorporation.

EI manufactured by Cordova/Michigan at the site was shipped to Cordova/California's main plant for use in the production of several drug intermediates. Receiving supplies of EI was critical to the success of Cordova/California, which was the largest user of the chemical in the United States.

Integration of the businesses of Cordova/California and Cordova/Michigan extended beyond the supplying of EI. Cordova/California handled marketing services for Cordova/Michigan, including solicitation of business and the processing of orders received. Cordova/Michigan did not even retain the paperwork regarding its customers' orders. In addition to providing

marketing services for Cordova/Michigan, Cordova/California managed all payroll, management, and accounting matters for both companies. Cordova/Michigan periodically paid Cordova/California for these services.

Cordova/California also established the sales schedule for Cordova/Michigan, and Cordova/California participated in decisions regarding Cordova/Michigan's production quotas and inventory controls.

5. Board of directors

Following the separate incorporation of Cordova/California and Cordova/Michigan, the subsidiaries' board of directors were inactive and nearly non-existent. As a result, policy-making for the companies was primarily handled by Aerojet officials serving in the subsidiaries' management.

Cordova/California and Cordova/Michigan never actually held regular board of directors meetings. Benjamin Simmons, president of Cordova/California and Cordova/Michigan as well as a director of both corporations, could not recall ever attending a board of directors meeting or even that any such meeting was ever held.

The boards of Cordova/California and Cordova/Michigan were composed almost entirely of Aerojet employees, and the boards essentially functioned to consent to the policies established by management.

6. Management

Aerojet participated actively in and exerted control over day-to-day operations at Cordova/California and Cordova/Michigan through widespread representation within the management ranks of the subsidiaries. As a result, the managements of Cordova/California and Cordova/Michigan were separate from Aerojet in form, not substance.

Throughout the Cordova era, leading Aerojet corporate officers held identical or similar positions with the wholly owned subsidiaries. After the incorporation of Cordova/California and Cordova/Michigan, no major distinction among the management groups for the three companies existed.

Aerojet officials dominated the management of the Cordova subsidiaries. At least 20 different corporate officers simultaneously held identical or nearly identical positions with Aerojet, Cordova/California and Cordova/Michigan during the Cordova era. At least 25 officers held the same posts with Cordova/California and Cordova/Michigan at the same time.

The president of the three companies was the same individual on at least two occasions totalling more than four years. In addition, the president of Cordova/California and Cordova/Michigan was the same person on three occasions. Individuals who served simultaneously as officers with Aerojet, Cordova/California and Cordova/Michigan were paid by Aerojet. Other Cordova/Michigan officers were paid by Cordova/California.

Other individuals held the same or nearly identical posts in triplicate, serving simultaneously as vice

president, treasurer, assistant treasurer, secretary, and assistant secretary of Aerojet, Cordova/California and Cordova/Michigan. In addition to these positions, Cordova/California and Cordova/Michigan shared officials serving as executive vice-president and controller.

This domination occurred from the inception of the separate corporate existence of Cordova/California. Immediately after Cordova/California's incorporation, a number of Cordova division officials merely assumed identical titles and responsibilities with Cordova/California, including the president, vice-president for operations, controller, and vice-president for marketing. In short, Cordova/California was operated as it had when it was the unincorporated Cordova division; a change in form, not substance had occurred. Similarly, the separate incorporation of Cordova/Michigan merely resulted in a multiplicity of titles, not a change in the way operations functioned at the site.

Aerojet further exercised influence over the management of its subsidiaries by having top officers report directly to the parent company, rather than to the subsidiaries' board of directors. For example, Benjamin Simmons, president of Cordova/California from 1977 to 1979, reported to Aerojet president J.H. Volbrecht and senior vice-president Clay Matthews. Delores Dorsey, who served as treasurer of all three companies for nearly eight years, reported directly to Aerojet's vice-president of finance, not the directors or presidents of the subsidiaries.

Aerojet also exerted control over the management of its subsidiaries by handling personnel decisions. Aerojet officials interviewed applicants and selected

replacements for vacancies within Cordova/California and Cordova/Michigan.

In sum, Aerojet actively participated in the management and direction of Cordova/California and Cordova/Michigan through representation within their management groups, which frequently mirrored the management of Aerojet itself. As a result of this widespread involvement in the management of its subsidiaries, Aerojet participated in and controlled decision-making in all facets of the company, including sales, marketing, manufacturing and waste disposal.

7. Financial matters

In addition to Aerojet's control over day-to-day operations at the subsidiaries through domination of management, Aerojet exercised total financial control over Cordova/California and Cordova/Michigan.

Cordova/California and Cordova/Michigan lacked authority to open a bank account, a power retained solely by Aerojet. All money generated by the subsidiaries was deposited into an Aerojet account. Cordova/California and Cordova/Michigan advised customers to send payments to a California post office box belonging to Aerojet.

In 1984, Aerojet assigned $25 million in worthless debt owed to it by Cordova/Michigan to Cordova/California, which eliminated more than $13 million owed by Aerojet to Cordova/California. The agreement assigning the debt was prepared by an Aerojet attorney and signed by Cordova/California's treasurer, who did not make any independent determina-

tion of whether the agreement was in the best interest of Cordova/California.

III. CONCLUSIONS OF LAW

A. *CERCLA overview*

CERCLA liability attaches if: 1) a release of hazardous substances has occurred, 2) at a facility, 3) causing a plaintiff to incur response costs, 4) and the defendant is a responsible party as defined under section 107(a), 42 U.S.C. § 9607(a). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir.1989); *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir.1989); *CPC Int'l Inc. v. Aerojet-General Corp.*, 731 F.Supp. 783, 786 (W.D.Mich.1989).

In this liability trial, the parties stipulated to the first three elements of liability, including that each party has incurred response costs in connection with the cleanup at the site. As a result, the central liability issue is whether CPC, MDNR, Aerojet, Cordova/California or Cordova/Michigan are responsible parties under section 107(a).

Section 107(a) establishes four bases for CERCLA liability. It provides:

> Notwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of a disposal of any hazardous substance owned or operated

> any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . .

42 U.S.C. § 9607(a).

In this action, the parties have invoked the first three of these liability provisions in bringing their claims: liability under section 107(a)(1) as a present owner and operator; liability under section 107(a)(2) as a past owner and operator at a time of a disposal; and liability under section 107(a)(3) as an arranger for disposal. Because the parties have stipulated that each is a "person" as defined under CERCLA, the question of their respective liability turns solely on whether status as a present owner and operator, past owner or operator at a time of disposal or arranger for disposal applies.

In applying these liability provisions to the facts of this case, the court is mindful that CERCLA

is a broadly remedial statute. Although some of CERCLA's provisions are vague and its legislative history sparse, the statute clearly aims to achieve prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the pollution. *J.V. Peters & Co. v. Administrator*, 767 F.2d 263, 264 (6th Cir.1985); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir.1985). As one court stated after examining the statute's legislative history, "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1112 (D.Minn.1982).

In light of CERCLA's remedial goals, the court is obligated to construe the statute's liability provisions broadly to avoid frustrating its legislative purpose. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir.1985); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 192 (W.D.Mo.1985); *United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H.1985). To the extent that liability under CERCLA is greater than under common law principles of tort and corporations, it is the result of CERCLA's statutory language and legislative intent, which the court is bound to follow unless and until it is altered by Congress.

B. Conclusions of law regarding CPC liability

1. Claims against CPC

The United States, MDNR and the Cordova defendants claim that CPC is liable under section 107(a)(2)

as a past owner or operator of the site. The parties claim that CPC as a parent corporation is liable because of its involvement with its former wholly owned subsidiary, Ott II, which owned the site from 1965 to 1972. The parties also allege that CPC should be held liable because Ott II is the successor corporation of Ott I.

2. Section 107(a)(2) "operator" liability

a. Parent corporation liability under section 107(a)(2)

After studying the statute, prior case law[6] and the critical literature on the subject[7], it is clear to the court that section 107(a)(2) liability may attach to a

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[6] A number of courts have recognized that parent corporations may be liable in CERCLA cases under limited circumstances as past owners or operators of sites contaminated by their subsidiaries. *See, e.g., United States v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I.1989), *aff'd*, 910 F.2d 24 (1st Cir.1990), *cert. denied*, 498 U.S. 1084, 111 S.Ct. 957, 112 L.Ed.2d 1045 (1991); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F.Supp. 345 (D.N.J.1991); *United States v. Nicolet, Inc.*, 712 F.Supp. 1193 (E.D.Pa.1989); *In re Acushnet River & New Bedford Harbor*, 675 F.Supp. 22 (D.Mass.1987); *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D.Idaho 1986); *Colorado v. Idarado Mining Co.*, 1987 WL 56460, 1987 U.S.Dist.Lexis 14254 (D.Colo.1987). *Contra Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F.Supp. 222 (W.D.La.1988), *aff'd*, 893 F.2d 80 (5th Cir.1990).

[7] *See, e.g.*, Aronsky & Fuller, "Liability of Parent Corporations for Hazardous Substance Releases under CERCLA", 24 U.S.F.L.Rev. 421 (1990); Allen, "Refining the Scope of CERCLA's Corporate Veil-Piercing Remedy", 6 Stan. Envtl.L.J. 43 (1986-87); Note, "Liability of Parent Corporations for Hazardous Waste Cleanup and Damages", 99 Harv.L.Rev. 986 (1986).

parent corporation in two ways. The first basis for liability of a parent corporation is direct liability under the "operator" language of CERCLA's section 107(a)(2). The second basis for liability is through common law veil-piercing, which may arise in any liability case involving a corporate defendant.

In determining that parent corporations may be held directly liable under CERCLA, the court relies on the language of the statute itself. Section 107(a)(2) of CERCLA holds liable "any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). The statute defines "owner or operator" circuitously to mean:

> . . . (ii) in the case of an onshore facility . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.

42 U.S.C. § 9601(20).

Though lacking in specificity, the plain language of CERCLA makes it unmistakably clear that direct liability may attach to parties other than the actual

owners of hazardous waste facilities.[8] To hold that actual ownership is mandated by CERCLA's liability provisions, a court would have to disregard the express language that makes liable those persons who have owned *or operated* a contaminated facility. Thus, reading the statute to employ only traditional concepts of ownership and liability through veil-piercing would require a court to ignore not only the statute's broadly remedial intent, but also its explicit words.[9] As a result, CERCLA liability may attach to parent corporations that have acted in a manner that constitutes operation of a facility even though they have not actually owned the site.

Determining what kind of activity by a parent corporation creates liability as an operator under section 107(a)(2) is a more difficult question.

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[8] Courts have held that a number of persons who may not have held legal title to a hazardous waste facility may be liable for its cleanup. *See, e.g., Kayser Roth*, 910 F.2d at 27 (parent corporations); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir.1990) (secured creditors); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F.Supp. 984 (D.S.C.1984), *aff'd in part, vacated in part*, 858 F.2d 160 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989) (lessees); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir.1985) (corporate officers and shareholders).

[9] In *Joslyn Manufacturing Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir.1990), *cert. denied*, — U.S. ——, 111 S.Ct. 1017, 112 L.Ed.2d 1098 (1991), the Fifth Circuit held that a parent corporation only may be held liable under CERCLA under veil-piercing principles when the corporate form has been used as a sham. To the extent that *Joslyn* appears to hold that actual ownership is necessary for liability to attach under section 107(a)(2), the court disregards the case as contrary to the statute's plain language and purpose.

CERCLA provides little guidance. By defining "owner or operator" circuitously, the statute fails to make explicit the what kind of "operator" it is intended to reach. As a result, different tests for liability have been developed by the courts. *Compare Kayser-Roth*, 910 F.2d at 27 (holding that to find parent corporations liable under CERCLA "at a minimum . . . requires active involvement in the activities of the subsidiary"); *Mobay*, 761 F.Supp. at 353-54 (holding parent corporations may be liable if they participated in the management or exercised control over a corporate entity) *with Bunker Hill*, 635 F.Supp. at 672 (holding liability turns on three-part test based on whether the parent corporation had the capacity to control or prevent release of hazardous material); *Kelley v. Arco Indus. Corp.*, 723 F.Supp. 1214, 1220 (W.D.Mich.1989) (adopting a test of whether a corporate individual "could have prevented or significantly abated the release of hazardous substances").

After visiting this issue over several months through exhaustive briefing for summary judgment and trial, I have concluded that CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. By expressly including as liable parties those that have "operated" facilities, Congress unmistakably expanded the reach of CERCLA beyond the limited realm of those who have "owned" sites. But the statute and its legislative history do not suggest that CERCLA rejects entirely the crucial limits to liability that are inherent to corporate law.

Accordingly, it seems that CERCLA's "owned or operated" language forges a new, middle ground. It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.

In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

Factors to consider in assessing whether a parent corporation operated its subsidiary include the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal. In addition, determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful in determining whether the parent has operated a wholly owned subsidiary. Other evidence may be less probative if it

is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.

In arriving at this standard for direct CERCLA liability of parent corporations, the court joins a majority of courts that have similarly concluded that CERCLA requires significant control and active participation by a parent corporation for liability to attach. *See, e.g., Kayser Roth*, 910 F.2d at 27; *Mobay*, 761 F.Supp. at 354; *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F.Supp. 1384, 1390 (N.D.Ill.1988); *Colorado v. Idarado Mining Co.*, 1987 WL 56460, 1987 U.S.Dist.Lexis 14254 (D.Colo.1987); *New York v. Exxon Corp.*, 112 B.R. 540, 547 (S.D.N.Y.1990).

The second basis for CERCLA liability of parent corporations is indirect or vicarious liability through the traditional common-law theory of veil-piercing. When a subsidiary itself is liable under CERCLA, a parent corporation may be held liable under circumstances that make it appropriate to disregard their separate corporate existence. In the Sixth Circuit, when applying a common law principle such as the vicarious liability of parent corporations to the question of CERCLA liability, state law controls. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248 (6th Cir.1991).

Under Michigan law, piercing the corporate veil to reach a parent corporation or other investor is an equitable doctrine that is applied to prevent fraud,

illegality or injustice. *See Schusterman v. Employment Security Comm.*, 336 Mich. 246, 57 N.W.2d 869 (1953); *Soloman v. Western Hills Dev. Co.*, 110 Mich. App. 257, 312 N.W.2d 428, 431 (1981). Separate corporate existence is disregarded only in limited circumstances, and each case considering whether to disregard the corporate entity turns on its own unique factual circumstances. *Lettinga v. Agristor Credit Corp.*, 686 F.2d 442, 446 (6th Cir.1982); *Ann Arbor v. University Cellar, Inc.*, 401 Mich. 279, 258 N.W.2d 1 (1977); *Brown Bros. Equip. Co. v. State*, 51 Mich. App. 448, 215 N.W.2d 591 (1974).

A Michigan court may generally pierce the veil of a parent corporation after finding that the subsidiary has been a mere instrumentality of the parent, that the separateness between the corporations has been used to commit fraud or wrong, and that unjust loss or injury to the plaintiff has occurred. *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 112 (6th Cir. 1989); *Maki v. Copper Range Co.*, 121 Mich. App. 518, 328 N.W.2d 430 (1982).

It also may be appropriate under some circumstances to pierce the veil of a separate corporate entity to serve the interests of justice when an individual is the sole shareholder of a corporation, as in the case of a parent corporation and its wholly owned subsidiary. *See Lettinga*, 686 F.2d at 446; *Pettaway v. McConaghy*, 367 Mich. 651, 116 N.W.2d 789, 790 (1962); *Montgomery v. Central Nat'l Bank & Trust Co.*, 267 Mich. 142, 255 N.W. 274, 276 (1934). For example, the fiction of the corporate form may be disregarded when a complete identity of interests exists between two corporate individuals so as to suggest that one was simply the alter ego of the

other. *See Pettaway*, 116 N.W.2d at 790; *Williams v. American Title Ins. Co.*, 83 Mich. App. 686, 269 N.W.2d 481, 486 (1978); *Montgomery*, 255 N.W. at 276.

b. Liability of CPC under section 107(a)(2)

To determine first whether CPC is directly liable under section 107(a)(2), the court has engaged in a highly fact-specific inquiry into the history of CPC's involvement with Ott II. In assessing CPC's level of participation and control in Ott II's activities, the court has evaluated various aspects of Ott II's business and its parent-subsidiary relationship, including: the role and composition of Ott II's board of directors; the role and composition of Ott II's management; the conduct of high-ranking CPC officials with respect to Ott II; the supervision of Ott II by CPC's development company; CPC's budgetary and capital expenditure restraints on Ott II; and CPC's involvement in specific Ott II policy matters, including waste disposal and labor problems.

After considering these and all the facts regarding CPC's involvement with Ott II, the court holds that CPC is directly liable under section 107(a)(2) as an operator because CPC actively participated in and exerted significant control over Ott II's business and decision-making. CPC's history of involvement in Ott II through its board, management, the CPC development company, and specific policy matters including hazardous waste disposal, demonstrates the high level of participation required for direct liability to attach to CPC under section 107(a)(2).

The court has considered the following facts particularly probative: 1) CPC's 100-percent ownership of

Ott II; 2) CPC's active participation in, and at times majority control over, Ott II's board of directors, which was an active decision-making body chaired by a CPC official throughout the Ott II era; 3) CPC's involvement in major decision-making and day-to-day operations through CPC officials who served within Ott II management, including the positions of president and chief executive officer; 4) the conduct of CPC officials with respect to Ott II affairs, particularly Arnold Ott, James Eiszner and Beverly Warner; 5) the function of the CPC development company as another source of policy-making for Ott II; 6) the active participation of and control by CPC officials in Ott II environmental matters, particularly through CPC's environmental director G.R.D. Williams who helped formulate Ott II policies, participated in regulatory meetings and issued directives regarding Ott II's responses to regulatory inquiries; 7) the active participation of CPC officials in Ott II labor problems; and 8) the financial control exerted by CPC through its approval of Ott II's budgets and major capital expenditures.

Liability attaches here because the evidence shows active participation and control by CPC in Ott II affairs both internally through the subsidiary's board and management and externally through the policies of the development company and the actions of individual CPC officials. The evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator. When a parent corporation permeates the board, management and decision-making of a wholly owned subsidiary that was

disposing of hazardous waste, operator liability directly attaches under CERCLA.

Based on all of these facts, the court holds CPC directly liable under section 107(a)(2) as an owner or operator during a period of disposal of hazardous waste.

Because the court has concluded that CPC is directly liable under CERCLA's section 107(a)(2), it need not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing, which is an alternative theory of liability.

Similarly, CPC's direct CERCLA liability makes it unnecessary to reach at this juncture the parties' claim of CPC liability arising from Ott II allegedly have been a successor corporation to Ott I.

A successor corporation may be a liable person under CERCLA. *Anspec*, 922 F.2d at 1247-48. Successor liability is a theory that may be applied under limited circumstances to reach parties that otherwise might escape responsibility for cleanup costs. *See, e.g., Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir.1988), *cert. denied*, 488 U.S. 1029, 109 S.Ct. 837, 102 L.Ed.2d 969 (1989); *Kelley v. Thomas Solvent Co.*, 725 F.Supp. 1446, 1457-59 (W.D.Mich.1988); *United States v. Vertac Chem. Corp.*, 671 F.Supp. 595, 614-19 (E.D.Ark.1987). In this case, however, CPC's direct liability for the cleanup costs at the site eliminates the necessity of determining the successorship question for liability purposes; based on its direct liability under section 107(a)(2), CPC is jointly and severally liable for cleanup costs at the site.

Nevertheless, the question of successor liability—namely, whether CPC may be held liable for the hazardous waste disposal of the Ott I era under Michigan successor liability and veil-piercing principles—could have some relevance to the court's future determination on the issue of apportionment. A responsible party's degree of involvement in the disposal of hazardous waste, the amount of hazardous waste involved and the degree of care exercised by the parties are some of the factors that a trial court may consider in determining the parties' proportionate shares in a contribution action. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991). As a result, the court defers any conclusions with respect to successorship until it reaches allocation issues at the conclusion of the remedy phase of this case.[10]

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[10] During trial, the court denied CPC's motion to exclude evidence regarding successor liability. Trial tr. at 2458-60. The court based its decision in part on the pretrial order that expressly set forth as an unresolved issue "whether Ott-II is the corporate successor to Ott-I" and facts relevant to the successor question. *Id.* After trial, CPC filed a motion to strike proposed findings of fact and conclusions of law filed by the United States and MDNR that asserted CPC, not Ott II, is the corporate successor to Ott I. CPC argues that it had no notice of this alternative theory of liability. As noted above, the court has not reached successorship issues in concluding that CPC is liable under CERCLA section 107(a)(2). Therefore, CPC's motion is moot with respect to liability. Parties participating in the remedy phase of the trial may, with leave of the court, file additional findings of fact and conclusions of law on the successor corporation issue that may be relevant to the court's allocation decision. Accordingly, CPC's motion is denied without prejudice.

C. Conclusions of law regarding MDNR liability

1. Claims against MDNR

CPC and the Cordova defendants claim that MDNR should be held liable under CERCLA for its activities at the site. CPC alleges that MDNR, Aerojet and Cordova/California are liable under section 107(a)(3) as arrangers of disposal arising from the October 1977 stipulation and consent order entered into by MDNR and Cordova/California. CPC, Aerojet, Cordova/California and Cordova/Michigan also allege that MDNR is liable under section 107(a)(2) as an operator due to its cleanup efforts at the site.

2. Section 107(a)(3) "arranger" liability

As the court has previously discussed, CPC's section 107(a)(3) claim, though novel, is tenable under the broadly remedial provisions of CERCLA. *CPC Int'l Inc. v. Aerojet-General Corp.*, 759 F.Supp. 1269, 1277-81 (W.D.Mich.1991); *CPC Int'l Inc. v. Aerojet-General Corp.*, 731 F.Supp. 783, 789-90 (W.D. Mich. 1989).

CPC has alleged that MDNR agreed at the time of Cordova/California's acquisition of the site, to remedy the groundwater contamination problem through resumed operation of purge wells. Because the purge wells were not operated and the groundwater contamination continued to spread, CPC claims, MDNR, Aerojet and Cordova/California should all be held liable for an arrangement for disposal of contaminated groundwater that actually worsened the problem.

In opinions ruling on pretrial motions, the court has recognized that the unchecked spread of groundwater contamination qualifies as disposal under CERCLA's statutory definition of the term. 42 U.S.C. § 9601(29) (adopting 42 U.S.C. § 6903(3)); *CPC*, 759 F.Supp. at 1278; *CPC*, 731 F.Supp. at 789. In addition, the court has noted that, if proved, CPC's allegations would make a case for CERCLA liability that is consistent with the statute's goal of placing the burden of cleanup on the parties responsible for creating or worsening an environmental problem. *CPC*, 759 F. Supp. at 1279-80. *See also United States v. Waste Indus. Inc.*, 734 F.2d 159, 164 (4th Cir. 1984); *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F.Supp. 549, 574 (M.D. Tenn. 1987); *United States v. Price*, 523 F.Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir.1982).

Several factual disputes precluded summary judgment on CPC's arranger claim. *CPC*, 759 F.Supp. at 1278-81. The central question in dispute was whether an agreement actually existed between MDNR and Cordova/California for MDNR to remedy the groundwater contamination problem.

After hearing all the testimony and evidence, the court has found that no agreement existed among the parties with respect to the groundwater contamination problem. Instead, the fate of the contaminated groundwater was left unresolved by the parties. After MDNR and Cordova/California reached an agreement regarding other cleanup responsibilities at the site, MDNR attempted to address the groundwater problem as part of its ongoing regulatory activity over the severe environmental problems at the site. As a result, MDNR requested and obtained a

$170,000 appropriation for a new groundwater purging system.

Because no arrangement was made between MDNR and Cordova/California with respect to the groundwater contamination, MDNR, Aerojet and Cordova/California are not liable under section 107(a)(3) as arrangers for disposal.

Other facts also preclude imposition of liability against MDNR under section 107(a)(3). As the court has previously noted, for liability to attach to a party without actual ownership or possession of a facility, a nexus must exist in which a party has assumed responsibility for or control over the disposition of hazardous waste. *CPC*, 759 F.Supp. at 1278; *CPC*, 731 F.Supp. at 789-90. *See also United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *Stilloe v. Almy Bros., Inc.*, 759 F.Supp. 95, 103-04 (N.D.N.Y. 1991); *United States v. Mottolo*, 629 F.Supp. 56, 60 (D.N.H. 1984).

In this case, a nexus of control or possession is lacking in the case against MDNR because MDNR's involvement in cleanup activities at the site was only regulatory. MDNR merely worked to eliminate or reduce severe environmental problems that had been left by prior owners and threatened public health and the environment. While dicta in the court's opinions on pretrial motions recognized the possibility of a sufficient nexus between MDNR and the site, MDNR proved at trial that a nexus of ownership or control between MDNR and the site did not exist.

Even if a prima facie section 107(a)(3) case against MDNR had been made, MDNR would not be liable because its actions at the site were taken in response to an environmental emergency. Section 107(d)(2) states, in relevant part:

> No State . . . shall be liable under this title for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2).

MDNR's regulatory activities at the site were initiated in response to an environmental emergency posed by dire environmental conditions that were created by prior owners and that threatened to worsen. Further, the state's response was devoid of the misconduct or gross negligence that would strip MDNR of its immunity under section 107(d)(2). Instead, the agency's cleanup efforts, though only a partial remedy for the problems, were a good-faith attempt to eliminate or control an environmental disaster at a time when the agency's tools were severely limited. The court concludes that section 107(d)(2) immunizes MDNR from any liability under section 107(a) because the state's activities at the site were an appropriate response to an environmental emergency.

3. Section 107(a)(2) "operator" liability

As the court has detailed above, "operator" liability must be interpreted broadly in accordance with the language and intent of CERCLA. A state may thus be held liable as an operator in limited circumstances when it permits hazardous waste disposal to occur at a site over which it exercises dominion or control. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989); *CPC*, 731 F.Supp. at 787-89; *United States v. Stringfellow*, 31 Envtl.L. Rep. 1315 (C.D.1990); *Hassayampa Steering Comm. v. Arizona*, 21 Chem. Waste Lit.Rptr (BNA) 322 (D. Ariz.1990); CPC, 731 F.Supp. at 787-88. However, CERCLA liability does not arise when a state agency merely engages in regulatory activity at a site. *See United States v. Dart Indus. Inc.*, 847 F.2d 144, 146 (4th Cir. 1988); *United States v. Azrael*, 765 F.Supp. 1239 (D. Md. 1991); *CPC*, 731 F.Supp. at 788.

In this case, MDNR's regulatory response to severe environmental problems left by others does not constitute the possession or control necessary for a state to become an operator. Because MDNR's actions were regulatory and the agency did not assume possession or control over the site or its problems, the court concludes that MDNR cannot be held liable as an operator under section 107(a)(2).

Furthermore, as set forth above, section 107(d)(2) immunizes MDNR from any CERCLA liability because its efforts at the site were a response to an environmental emergency and its actions cannot be characterized as gross negligence or intentional misconduct. *See supra*, pp. 577-78.

For the reasons stated, MDNR is not liable as an operator under section 107(a)(2).

D. Conclusions of law regarding liability of Aerojet, Cordova/California, Cordova/Michigan

1. Claims against Aerojet and its subsidiaries

The United States, MDNR and CPC have advanced a variety of claims against Aerojet and its wholly owned subsidiaries, Cordova/California and Cordova/Michigan. The United States, MDNR and CPC allege that Cordova/Michigan and Aerojet are liable under section 107(a)(1) as the present owner and operator of the site. They further allege that Aerojet, Cordova/California and Cordova/Michigan are liable under section 107(a)(2) for having owned or operated the site during a period of disposal. CPC also alleges that Aerojet and Cordova/California may be held liable under section 107(a)(3) for the alleged arrangement with MDNR for removal of contaminated groundwater.

2. Section 107(a)(1) "present owner" liability

Section 107(a)(1) holds the "present owner and operator of a . . . facility" liable. Because it is undisputed that Cordova/Michigan has held legal title to the site since 1978, direct CERCLA liability clearly attaches to Cordova/Michigan under section 107(a)(1).

Aerojet's liability under section 107(a)(1) as a present owner turns on the question of whether piercing the corporate veil is appropriate. Aerojet cannot be held directly liable under section 107(a)(1) merely because its wholly owned subsidiary is the actual owner and operator of the facility. But as with section 107(a)(2) "owner or operator" liability, a parent corporation may be held liable as a "present owner and operator" if the circumstances justify disregarding the corporate form and attaching vicarious liability.

As noted above, the Sixth Circuit recently established that state law controls questions of when CERCLA liability should attach to parent corporations under common law theories and principles. *Anspec*, 922 F.2d at 1248. In this case, then, Michigan's veil-piercing standards apply. Under Michigan law, the court therefore must engage in a searching inquiry into all the unique facts and circumstances of the parent-subsidiary relationship at issue to determine whether their separate corporate existences should be disregarded. *See supra*, at p. 574.

After considering all the evidence as well as controlling Michigan law on veil-piercing, the court concludes that this is an appropriate case to disregard the corporate form to serve the interests of justice. *See Lettinga*, 686 F.2d at 446; *Pettaway*, 116 N.W.2d at 790; *Montgomery*, 255 N.W. at 276.

Aerojet totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary. In both its corporate structure and function, Cordova/Michigan was a mere instrumentality of Aerojet, lacking any

structural or actual independence in the operation of its business. The creation of Cordova/Michigan as a separate subsidiary only served as an attempt to shield Aerojet from liabilities associated with the companies' integrated business at a facility where pollution problems were known to exist. Permitting Aerojet to escape CERCLA liability as the present owner and operator here would create an injustice to the parties who are entitled to recover their cleanup costs from the present owner and operator of a contaminated site. It would also do injustice to CERCLA itself, which aims to make parties that have actually owned or operated hazardous waste sites pay for their cleanup.

For these reasons, the court concludes that Aerojet is liable under section 107(a)(1) because, under Michigan's well-settled standards, veil-piercing is appropriate. *See Bodenhamer Bldg. Corp.*, 873 F.2d at 112; *Lettinga*, 686 F.2d at 446; *Pettaway*, 116 N.W.2d at 790; *Montgomery*, 255 N.W. at 276.

In reaching this conclusion, the court has considered the following facts to be particularly probative: 1) Aerojet was 100-percent shareholder of Cordova/California, which in turn wholly owned Cordova/Michigan; 2) Aerojet itself led the acquisition of the site, only incorporating its Cordova division after it became apparent that the site would be purchased, about 10 days before the signing of the stipulation and consent order; 3) the timing of the incorporation of Cordova subsidiaries reflected Aerojet's singular goal of insulating itself from liability; 4) the purpose of acquiring the site was to manufacture a product essential to Aerojet's Cordova division that would no longer be available from outside sources; 5)

when manufacturing operations commenced at the site, Cordova/Michigan was part of an integrated business operation in which Cordova/Michigan supplied EI for use in manufacturing by Cordova/California; 6) the incorporation of Cordova/Michigan and Cordova/California were changes in form, not in substance, as former officers in Aerojet's Cordova division retained identical or similar jobs with the new subsidiaries; 7) Aerojet dominated the corporate hierarchy of both Cordova/Michigan and Cordova/California, where at least 20 Aerojet officials have held positions nearly identical to those they have held simultaneously with the parent company; 8) Cordova/Michigan and Cordova/California officials reported directly to Aerojet officials, who held authority to give directions on day-to-day operations and policy matters; 9) the board of directors of Cordova/Michigan and Cordova/Michigan were non-functional and did not even convene in meetings; 10) Aerojet possessed total financial control over Cordova/Michigan and Cordova/California, which lacked of authority to maintain separate bank accounts; and 11) Aerojet arranged the assignment to Cordova/California of $25 million in worthless debt owed to it by Cordova/Michigan, which effectively eliminated $13 million owed by Aerojet to Cordova/California.

For the reasons stated, the court holds Cordova/Michigan and Aerojet liable under section 107(a)(1) as the present owner of the site.

3. Section 107(a)(2) "operator" liability

Because disposal of hazardous substances occurred at the site during the Cordova era[11], the liability of Cordova/California and Aerojet turns on whether the companies have "owned or operated" the facility, as with the court's determination of CPC's liability.

Cordova/California actually owned the site until it transferred the property to its newly created subsidiary, Cordova/Michigan, in November 1978. During this period, Cordova/California engaged in construction activities to prepare the facility for its chemical manufacturing operations, and the company engaged in the cleanup activities set forth in the stipulation and consent order signed with MDNR. Because Cordova/California owned the site from October 1977 to November 1978 during which hazardous waste disposal occurred, the court holds Cordova/California liable under section 107(a)(2).

Aerojet's liability under section 107(a)(2) must be determined under the same framework used in CPC's case, in which direct liability under the statute's "operator" language and vicarious liability through common law veil-piercing provide alternative theories

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[11] As the court has noted above and in its previous opinions, disposal of hazardous substances at the site occurred after 1977, as contaminants continued to spread into the ground and water and were carried off-site by the flow of groundwater. *See*, *supra*, p. 576; *CPC*, 759 F.Supp. at 1278; *CPC*, 731 F.Supp. at 789. In addition, hazardous substances used at the site during the Cordova period of ownership has been found in the contamination at the site, indicating that additional disposal occurred.

for holding a parent corporation liable. *See supra*, pp. 571-74.

In assessing Aerojet's direct liability as an operator at the site, the court must once again engage in a comprehensive inquiry into Aerojet's relationship with its subsidiaries and involvement with the site during the Cordova era. The court must determine whether the evidence has shown that Aerojet exerted power or influence by actively participating in and exercising control over the subsidiaries' business during a period of disposal of hazardous waste.

In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.

As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.

Accordingly, the court concludes the Aerojet is directly liable as an operator under section 107(a)(2).

Aerojet's direct liability under section 107(a)(2) makes it unnecessary to pierce the corporate veil under this provision, although the court has already concluded that disregarding the corporate form is

appropriate in Aerojet's case for liability under section 107(a)(1). *See supra*, pp. 578-79.

For the reasons set forth above, Cordova/California and Aerojet are liable under section 107(a)(2).

4. Section 107(a)(3) "arranger" liability

As the court addressed above in concluding that MDNR could not be held liable as an arranger, no agreement existed between MDNR and either Aerojet or Cordova/California with respect to a remedy for the groundwater contamination that existed at the site at the time of the signing of the stipulation and consent order. *See, supra* at pp. 576-77.

Accordingly, the court concludes that Aerojet and Cordova/California are not liable under section 107(a)(3) for arranging for the disposal of hazardous waste.

5. Section 107(b)(3) innocent landowner defense

Aerojet, Cordova/California and Cordova/Michigan contend that any liability findings against them are precluded by section 107(b)(3). The section provides a limited defense to CERCLA's strict liability to those parties who are innocent purchasers. The provision states, in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

. . . .

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; . . .

42 U.S.C. § 9607(b)(3). The statute further defines "contractual relationship," whose existence can prevent use of the innocent purchaser defense, to include, without limitation:

> land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance

> which is the subject of the release or threatened release was disposed of on, in, or at the facility.

. . . . .

42 U.S.C. § 9601(35)(A).

To summarize, section 107(b)(3) provides a defense to liability in this case if a defendant shows that: 1) the hazardous contamination at the site was caused solely by other parties; 2) no direct or indirect contractual relationship existed between it and the parties responsible for contaminating the site; 3) it did not know or have reason to know of the contamination at the site at the time of purchase; and 4) it exercised due care with respect to the hazardous waste at the site.

Failure to prove any of these elements by a preponderance of the evidence precludes use of the innocent landowner defense. Aerojet, Cordova/California and Cordova/Michigan so fail. By acquiring the site from Story's bankruptcy trustee, Cordova/California had an indirect contractual relationship with a party responsible for contaminating the site. *See In re Sterling Steel Treating, Inc.*, 94 B.R. 924 (Bkrtcy.E.D.Mich.1989). In addition, Aerojet and Cordova/California clearly knew about contamination at the site; in fact, Aerojet's obligations for cleanup were central to the negotiations over acquisition of the site. Aerojet and its subsidiaries also have failed to prove that the contamination was caused solely by others and that they exercised due care at the site. A hazardous substance used by Cordova/Michigan in its manufacturing process is among those in the contamination at the site. In addition, the con-

tamination created by prior owners has spread unabated off site, worsening the contamination problem, due at least in the part to the continued inoperation of purge wells. These facts make the defense of section 107(b)(3) inapplicable to the liability of Aerojet, Cordova/California and Cordova/Michigan.

For these reasons, the court holds that section 107(b)(3) does not preclude the imposition of liability against Cordova/Michigan, Cordova/California and Aerojet.

IV. CONCLUSION

Based on the findings of facts and conclusions of law set forth above, the court holds that CPC, Aerojet, Cordova/California and Cordova/Michigan are liable under CERCLA's section 107(a) for cleanup costs at the site, and that MDNR is not liable.

CPC is liable for claims brought under section 107(a)(2) as an operator of the site during a period of disposal.

MDNR is not liable for claims brought under section 107(a)(2) as an operator of the site during disposal or under section 107(a)(3) as an arranger for disposal of hazardous waste.

Aerojet is liable for claims brought under section 107(a)(1) as the present owner and operator of the site and under section 107(a)(2) as an operator of the site during disposal. Cordova/California is liable under section 107(a)(2) as an operator of the site during

disposal. Cordova/Michigan is liable under section 107(a)(1) as the present owner and operator of the site and under section 107(a)(2) as an owner or operator during a period of disposal. Aerojet and Cordova/California are not liable under section 107(a)(3) as arrangers of disposal of hazardous waste.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-2288, 92-2326

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN; CORDOVA CHEMICAL COMPANY; AEROJET-GENERAL CORPORATION, DEFENDANTS-APPELLANTS (92-2288), DEFENDANTS-APPELLEES

CPC INTERNATIONAL INC., DEFENDANT-APPELLEE, DEFENDANT-APPELLANT (92-2326)

ARNOLD C. OTT; COMMERCIAL UNION INSURANCE COMPANY, ET AL., DEFENDANTS

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, DEFENDANT-APPELLEE

[Argued March 25, 1994]

[Decided: July 14, 1995]

Before: CELEBREZZE, RYAN, and NORRIS, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which CELEBREZZE, J., joined. RYAN, J. (pp. [150a-170a], delivered a separate dissenting opinion.

ALAN E. NORRIS, Circuit Judge.

This appeal highlights the difficulty that often attends the apportionment of liability for clean-up costs of sites that have been subjected to long-term environmental degradation. In the present case, brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9674 (1988 & Supp. V 1993), the environmental damage occurred over a period of decades and during the watch of several owners.

A central concern on appeal is the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred during the ownership of a subsidiary. Because we adopt a stricter standard than did the district court for imposition of such liability, we reverse certain of its determinations and remand for further proceedings.

I. PROCEEDINGS BELOW

In May and June 1991, the district court conducted a fifteen-day bench trial to determine which parties were responsible for clean-up costs related to pollution of a site located in Dalton Township, Michigan. In addition to the live testimony of twenty-nine witnesses, the court received more than 2,300 exhibits and reviewed dozens of deposition transcripts. Given the complexity of the proceedings below, the factual findings contained in the district court's published opinion are extensive. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F.Supp. 549, 555-70 (W.D.

Mich. 1991). We summarize them here by way of background.

Beginning in 1957, a series of owners used the Dalton Township site to manufacture chemicals. The initial owner, the Ott Chemical Company ("Ott I"), controlled the site from 1957 until 1965. During this time, the groundwater flowing underneath the site became contaminated, a development confirmed by tests conducted in 1964.

Pollution of soil, surface water, and groundwater continued after the Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site in 1965. The use of unlined lagoons as a means of chemical waste disposal was the principal cause of the contamination. According to the district court, this practice spanned the period from 1959 until at least 1968.

See page from these lagoons did not, however, constitute the sole source of pollution that occurred during the ownership of Ott I and Ott II. Further contamination emanated from chemical spills from train cars, from chemical drums, from overflows of chemicals contained in a cement-lined equalization basin, and from other sources. Groundwater pollution did not go completely untreated during this time; from 1965 until 1974, purge wells were operated intermittently in an attempt to alleviate the problem.

In 1972, the Story Chemical Company ("Story") acquired the site from Ott II and continued to operate it until 1977, when bankruptcy ended operations. At that point, a trustee in bankruptcy assumed title to the site and attempted to find a buyer.

Active governmental response to the pollution problems at the site began in 1977, after Story's bankruptcy, when the Michigan Department of Natural Resources ("MDNR") visited the site to assess the situation. In view of the severity of the environmental problems and the lack of resources to pay for a cleanup, the MDNR became active in efforts to attract a purchaser who would participate financially in clean-up efforts. This search led to the signing of a document on October 13, 1977, by the Cordova Chemical Company ("Cordova/California"), a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), and the MDNR. The district court described the agreement and its aftermath:

> It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. . . .
>
> . . . .
>
> . . . MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.
>
> . . . .
>
> With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the [agreement] stated:

. . . .

> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary. . . .

. . . .

However, the agreement did not provide for a total cleanup of the site's severe environmental problems. . . .

In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.

. . . .

> . . . Cordova/California and MDNR fulfilled their cleanup obligations under the [agreement]

. . . .

CPC Int'l v. Aerojet-General, 777 F.Supp. at 564-67.

Having executed this document, Cordova/California purchased the site the following day from the Story bankruptcy trustee. Cordova Chemical Company of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, acquired ownership of the site in 1978. Cordova/Michigan retains ownership, although manufacturing operations at the site ceased in 1986.

The district court made the following observations regarding conditions at the site during the ownership of the Cordova companies:

> During their period of operations, [the companies] neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

Id. at 556. In short, although the preexisting groundwater contamination problem was not remedied during their ownership, the trial court concluded that neither Cordova/California nor Cordova/Michigan exacerbated the condition.[1]

The federal Environmental Protection Agency became involved in cleanup of the site in 1981. Since

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[1] The district court noted that two hazardous chemicals—benzene and 1,2 dichloroethane—were found at the site and used during the Cordova period of ownership. *Id.* at 556, 579 n. 11. Although Cordova/Michigan, in an April 5, 1984, letter to the federal EPA, acknowledges generating small quantities of these materials for disposal, we find nothing in the record to support a finding that any additional release of hazardous substances occurred at the site during the Cordova period.

then, the EPA has formulated a long-term response to the environmental damage that has occurred at the site; the cost of this effort will run into the millions of dollars.

II. CERCLA LIABILITY

Section 107(a) of CERCLA lists the parties who are potentially liable for the clean-up costs of a polluted site.[2] 42 U.S.C. § 9607(a). For the purposes of this action, those parties include the present owner *and* operator of a facility from which there is a release of a hazardous substance, any prior owner or operator of a facility whose involvement coincided with disposal of a hazardous substance, and any person who arranged

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[2] 42 U.S.C. § 9607(a) states, in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances . . .
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action. . . .

for the disposal or transport of hazardous waste from a facility. 42 U.S.C. § 9607(a)(1)-(3). The parties stipulated that the site is a "facility" as defined by CERCLA, that it contains "hazardous substances," that "releases" of hazardous substances have occurred and threaten to continue, and that CPC, the MDNR, Aerojet, Cordova/California, and Cordova/Michigan are "persons" as defined by the statute. *Id.* at 556.

Because courts that have been asked to render liability decisions in CERCLA actions frequently invoke the remedial purpose of the act, *e.g.*, *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 26 (1st Cir.1990), *cert. denied*, 498 U.S. 1084, 111 S.Ct. 957, 112 L.Ed.2d 1045 (1991), we will review that subject before considering the liability of those parties now before us.

Congress did enact CERCLA as a "remedial statute designed to protect and preserve public health and the environment." *Kayser-Roth*, 910 F.2d at 26; *accord Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir.1993); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241-42 (6th Cir.1991) (reviewing this circuit's approach to CERCLA liability). Accordingly, courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals in the absence of specific congressional intent otherwise. *Anspec*, 922 F.2d at 1247 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir.1985)).

It must be recognized, however, that it is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise.

See generally Shore Realty Corp., 759 F.2d at 1039-42 (discussing legislative history). As the district court recognized, "some of CERCLA's provisions are vague and its legislative history sparse." *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 571; *accord Anspec*, 922 F.2d at 1247 (characterizing the legislative history as "scant"); *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221 ("[C]ongressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship.").

Courts would not be warranted, therefore, in pointing to the "remedial legislation" litany, *see generally* Norman J. Singer, 3 Sutherland Statutory Construction § 60.01 (5th ed. 1992) (the rule that remedial statutes should be liberally construed is "firmly established"); *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 868, 112 L.Ed.2d 969 (1991) (noting that 42 U.S.C. § 1983, as a remedial statue, should be liberally construed), as a means for filling in the blanks so as to discern a congressional intent to impose liability under nearly every conceivable scenario. Thus, while the liability provisions concerning facility operators should be construed so that financial responsibility for clean-up operations falls upon those entities who contributed to the environmental problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. In fact, this court has said, "Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions *they created*." *Anspec*, 922 F.2d at 1247 (emphasis added).

In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions.

In its effort to discern the sweep of CERCLA liability, the district court concluded that:

> CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. . . .
>
> Accordingly, it seems that CERCLA's "owned or operated" language forges a *new, middle ground*. It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.

In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a sub-

sidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

CPC Int'l v. Aerojet-General, 777 F.Supp. at 573 (emphasis added).

On the basis of this "new, middle ground," the district court found both CPC and Aerojet liable as operators for the disposal of hazardous substances that occurred while their subsidiaries operated the site.

III. DISCUSSION

A. *CPC*

The district court reasoned that liability potentially could attach to CPC as a parent corporation in two ways: direct liability under CERCLA's "operator" language or by common law veil-piercing. It determined that CPC was liable as an operator of the site for environmental damage that occurred during the ownership of Ott II; this liability was grounded in section 107(a)(2) of CERCLA, which renders "any person [liable] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). To reach this conclusion, the court had to find CPC, as a parent corporation, responsible for the conduct of its wholly owned subsidiary corporation, Ott II. Because the court held CPC directly liable as an operator, it did not reach the question of whether CPC was vicariously liable through the traditional common law theory of veil-piercing.

It is not at all clear from the district court's opinion whether the standard for finding parental liability under its "new, middle ground" is the actual operation of the subsidiary's business or, on the other hand, the exertion of power or influence through active participation in the subsidiary's business. Although they are used interchangeably in the district court's opinion, the two concepts are not interchangeable. In fact, the facts recited by the district court appear to support liability under the latter standard but not under the former. This confusion underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress. We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of a "new, middle ground."

CERCLA defines the "owner or operator" of an onshore facility as "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). When the facility has been conveyed to a unit of state or local government, the definition differs. It then includes "any person who owned, operated or otherwise controlled activities at such facility immediately [before the transfer to the governmental authority]." 42 U.S.C. § 9601(20)(A)(iii). It thus appears that the drafters of the statute distinguished an operator from a person who "otherwise controlled" a facility. When the owner of a facility contracts out the daily running of the operation to a third party, that party presumably attains operator status (and its attendant liability). However, when a parent corporation

actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporate law, nothing in the definition just cited or in the rest of the statute indicates that the parent has assumed the role of operator.

Despite the definition of "owner or operator," several circuits and the district court below have determined that parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries. *See, e.g., Kayser-Roth*, 910 F.2d at 26-27; *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir), *cert. denied*, — U.S. —, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992); *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 572-73.

While we understand the district court's desire to extend the reach of CERCLA so that its remedial purpose is given maximum impact, the "new, middle ground" threatens to sweep away the protections long afforded by the corporate form with respect to limited liability. In our view, nothing in the statute or its legislative history supports such a reading. As the Fifth Circuit has noted in this context, "[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir.1990).

The district court's approach presents a number of problems. First, it replaces the relatively bright line provided by the doctrine of piercing the corporate veil, which typically requires a fraudulent purpose, with a nebulous "control" test. When, precisely, is a parent acting in a manner consistent with its investment

relationship as opposed to a manner that triggers operator liability? The indicia enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offer little guidance. Certainly, these activities are not grounds traditionally relied upon to pierce the corporate veil.

Second, the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites. The case before us illustrates this point. There is no dispute that the MDNR actively sought a private sector partner to take over and assist in the remediation of the site. Aerojet indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of the agreement with the MDNR and the use of subsidiaries. To scuttle such sensible and legitimate precautions in favor of an unpredictable "control" test would actually contravene the public interest by discouraging businesses from becoming involved in such projects.[3]

In view of its flaws, we reject the district court's "new, middle ground" for defining liability. We conclude that a parent corporation incurs operator liability pursuant to section 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met.

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[3] Although it does not affect our resolution of the liability issue, we note in passing that these negotiations occurred before the enactment of CERCLA.

In determining whether the circumstances in this case warrant a piercing of the corporate veil in order to disregard the separateness of the corporate entities, we look to state law. *See Anspec*, 922 F.2d at 1248. Michigan appears to follow the general rule that at least two definitive requirements must be met in order to pierce the corporate veil. First, there must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist; second, the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.30 (perm. ed. rev. vol. 1990); Stephen H. Schulman et al., Michigan Corporation Law & Practice § 3.9(c) (1991 Supp.); *see also Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111-12 (6th Cir.1989) (citing cases). Organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form. *Gledhill v. Fisher & Co.*, 272 Mich. 353, 359, 262 N.W. 371, 373 (1935).

The district court relied upon the following factors in determining that CPC was an "active operator" of its subsidiary and therefore directly liable under section 107(a)(2): 100% ownership of Ott II; participation on Ott II's board of directors; a cross-pollination of officers who were involved in decision-making and daily operations; active participation by CPC officials in environmental matters; and financial control of Ott II through approval of budgets and capital expenditures. *CPC Int'l v. Aerojet-General*,

777 F.Supp. at 575. While these factors reveal a parent that took an active interest in the affairs of its subsidiary, none of them indicate that CPC utilized the corporate form to perpetrate a "fraud or wrong" as required before a court can pierce the veil.

Accordingly, the district court's finding of liability with respect to CPC must be reversed.

B. *MDNR Liability*

The district court rejected liability claims that were advanced against the MDNR on two fronts: as an operator and as an "arranger." Only the district court's decision regarding arranger liability is appealed.

Section 107(a)(3) of CERCLA imposes liability on:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3).

It is contended that the MDNR incurred arranger liability when it negotiated with Cordova/California for the acquisition of the site and agreed with Cordova/California on a plan to clean up the groundwater contamination.

We agree with the district court's conclusion that the MDNR escapes liability because its actions were

taken in response to an environmental emergency as provided in section 107(d)(2):

> No state or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2). Our reading of the record indicates that the MDNR acted in good faith when attempting to address the groundwater contamination of the site. That its efforts proved to be less than entirely successful is unfortunate, but does not subject the agency to liability.

C. *Liability of Aerojet and its Subsidiaries*

1. *Owner Liability*

The district court held both Aerojet and Cordova/Michigan liable as present owners of the site under section 107(a)(1) which assigns liability to "the owner and operator of a vessel or a facility." 42 U.S.C. § 9607(a)(1). Cordova/Michigan does not challenge this decision on appeal and we therefore express no opinion with respect to its liability.

As to the parent corporation, the district court appropriately looked to Michigan law in determining

whether to pierce the corporate veil. The court, however, misapplied that law. The court determined that Aerojet had "totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary." *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 578. Accordingly, the court determined that it was appropriate to pierce the corporate veil and impose vicarious liability. Among the grounds cited for its decision, the court highlighted the total ownership by the parent, Aerojet's active participation in the acquisition of the site, the timing of the incorporation of the subsidiaries, cross-pollination of corporate officers, financial control, and the integration of the businesses. *Id.* at 577.

These actions, however, do not approach the level of culpable conduct necessary to pierce the corporate veil under Michigan law. *Bodenhamer Bldg. Corp.*, 873 F.2d at 112. While Aerojet obviously sought to limit its liability for existing environmental problems through good faith negotiation with the MDNR and prudent use of the corporate form, there is nothing to suggest that the company acted with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate forms. Although Aerojet took an active interest in its subsidiaries, we are not persuaded that Cordova/Michigan was anything but a viable corporate entity. Accordingly, the district court erred when it pierced the corporate veil to assign liability to Aerojet as an owner.

The district court also noted that Cordova/California actually owned the site from October 1977 until November 1978. Although the company began clean-up operations as required by its agreement with the MDNR, the district court found that additional releases of hazardous substances occurred during this period. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 579. It thus imposed liability on Cordova/California as a former owner pursuant to section 107(a)(2).

This conclusion, however, conflicts with the district court's summary of activity at the site during the ownership of the Cordova companies. *Id.* at 556. On remand, therefore, we ask the district court to indicate with greater specificity precisely which portions of the record it relies upon to support a finding that additional releases of hazardous substances occurred during Cordova/California's brief ownership. Absent such evidence, liability will not attach to Cordova/California as a former owner of the site.

2. *Operator Liability*

Finally, we turn to the district court's alternative imposition of liability on Aerojet pursuant to section 107(a)(2), precisely the same basis for liability that we have already discussed, and rejected, with respect to CPC. Since we reject the "control" test, no liability attaches unless the corporate veil can be pierced. We therefore conclude that Aerojet cannot be held liable as an operator pursuant to section 107(a)(2).

3. *Defenses*

Upon remand, the district court should also revisit its treatment of the defense raised by Aerojet, Cordova/California, and Cordova/Michigan under section 107(b)(3). The pertinent part of the statute follows:

> [A] person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were *caused* solely by—
>
> ....
>
> (3) an act or omission of a third party other than . . . one whose act or omission occurs *in connection with* a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b) (emphasis added).

In parsing the exceptions to the defense, the district court noted that under 42 U.S.C. § 9601(35)(A), the term "contractual relationship" includes deeds transferring title. Thus, the district court concluded that a defense would be unavailable to a defendant who had a direct or indirect contractual

relationship with the parties responsible for contaminating the site. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 581. Under this view, the defense could not be invoked by any defendant who was a party to a deed with a polluter. The district court, however, ignored the requirement that, in order to render the defense inapplicable, the hazardous substance release must have resulted from the act of a third party "in connection with" the contractual relationship with the defendant. The "in connection with" language of the defense appears to have been designed to preclude a person from escaping liability by contracting for a third party to do his dirty work for him.

As we pointed out above, from what we glean from the district court's recitation of facts, the release of hazardous substances appears to have been *caused* solely by the predecessors of these three defendants.

IV. CONCLUSION

For the foregoing reasons, the district court is **reversed** in part and **affirmed** in part and this cause is **remanded** to the district court for further proceedings consistent with this opinion.

RYAN, Circuit Judge, dissenting.

The court's opinion today rests primarily on three grounds:

- That a parent corporation cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned and ostensibly operated by its subsidiary corporation, but may face *only* vicarious liability under state law corporation veil piercing principles;
- That piercing the corporate veil under Michigan law requires circumstances showing that the corporate form was used for a "fraudulent purpose."
- That the district court erred in finding that the defendants failed to prove their entitlement to the so-called third-party defense under 42 U.S.C. § 9607(b)(3).

In my judgment, the court is mistaken on all three grounds, and I therefore respectfully dissent.

I.

Direct Liability of a Parent Corporation under § 9607(a)(2)

Nothing in CERCLA, 42 U.S.C. § 9601 *et seq.*, excludes a parent corporation, as a matter of law, from liability for operating a contaminating facility if, in fact, it is operating it. CERCLA identifies the individuals and entities that may be held directly liable as responsible parties, and they include, as relevant here:

> (1) the owner and operator of a . . . facility, [and]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

42 U.S.C. § 9607(a)(1), (2).

CERCLA defines "owner or operator" as "*any person* owning or operating such facility," § 9601(20)(A) (emphasis added), and excludes from the definition "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility," *id.* The next subsection defines "person" to include a corporation. § 9601(21).

The district court came to the conclusion, as I do, that a parent corporation may face potential liability as an operator of a contaminating facility because the plain language of § 9607(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility. Nothing in the language of § 9607 or elsewhere in CERCLA suggests that Congress's definitions of "operator" or "person" include any corporation except a parent corporation.

The majority opinion holds, however, that Congress indeed intended to exclude parent corporations from potential direct liability as facility operators because Congress did not "contemplat[e] the abandonment of traditional concepts of limited liability associated with the corporate form." Maj. op. at 589. But that conclusion seems to me to beg the question. The question under subsection (a)(2) is not whether a parent corporation may be held vicariously liable for abuse of its subsidiary's corporate form—clearly it may—but whether Congress has created direct liability if the facts show that the parent corporation was the actor actually operating a contaminating facility. Stated differently, the issue is whether Congress has excused a parent corporation who is in fact

operating a contaminating facility from direct liability, if it is doing so in the name of a corporate subsidiary. The district court thinks not, and I agree.

The district court held that a parent corporation may be held directly liable under § 9607(a)(2) as an operator if its level of control over the subsidiary is so complete and pervasive as to exceed mere oversight:

> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 573 (W.D.Mich.1991).

The question is simply one of fact. The parent corporation is liable if it is shown to have been the operator-in-fact of the facility as indicated by the extent of its domination and control of its subsidiary—the ostensible operator. In such circumstances, there is no issue of veil piercing at all;it is a matter of applying the language of § 9607(a)(2). As the district court pointed out, some of the factors relevant to deciding whether the parent is the

operator-in-fact include considerations such as the parent corporation's involvement in the subsidiary's board of directors and daily operations, and the parent corporation's control over the subsidiary's policy making in areas such as personnel, finance, and waste disposal. Also relevant are the facts leading up to the subsidiary's origin and the reasons for its existence, and the parent's level of financial monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions.

At least three other circuits have held that a parent corporation may be held directly liable as an operator under § 9607(a)(2) without any consideration of corporate veil piercing. In *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir.1990), *cert. denied*, 498 U.S. 1084, 111 S. Ct. 957, 112 L.Ed.2d 1045 (1991), the court declared that the plain language of CERCLA compelled the conclusion that parent corporations may be held directly liable under § 9607(a)(2):

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability. In addition, the legislative history provides no indication that Congress intended "all persons" who are "operators" to exclude parent corporations . . . . Thus, our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA.

Id. at 26 (citation omitted).

And, "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." *Id.* at 27.

In *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir.1993), the court embraced the *Kayser-Roth* standard, emphasizing that "operator liability may be established even without evidence that a [parent] corporation controlled the environmental decisions of an affiliated corporation as long as there exist other factors which sufficiently demonstrate pervasive control." *Id.* at 1222 n. 13.

Similarly, in *Jacksonville Electric Authority v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993), the court agreed that the test for parent corporation liability as an operator was whether the parent "'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.'" *Id.* at 1110 (quoting *Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F. Supp. 1542, 1547-48 (M.D.Fla.1991)).

Two other circuits apparently would hold a parent corporation directly liable as an operator not because the parent corporation actually controlled the sub-

sidiary, but rather because it had the authority to do so. In *Nurad, Inc. v. William E. Hooper & Sons*, 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940, 113 S. Ct. 377, 121 L. Ed.2d 288 (1992), the Fourth Circuit held that the key inquiry is not whether the parent corporation actually controlled the subsidiary, but rather whether it had the "'*authority* to control the operations or decisions involving the disposal of hazardous substances at the [s]ite.'" *Id.* at 842 (emphasis in original). In *dicta*, the Ninth Circuit also has identified "authority to control the cause of the contamination" as the standard. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir.1992).

In addition, the Tenth Circuit, in *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842 (10th Cir.1993), applied the *Kayser-Roth* standard to impose operator liability on a company director directly, and not under state corporation law veil piercing standards.

Although I would not go so far as to hold, as the Fourth and the Ninth Circuits would, that mere "authority to control" is sufficient, it is clear that all the circuits that have addressed the point, save one, have found that a parent corporation is exposed to direct liability under § 9607(a)(2) without regard to common law veil piercing.

Only the Fifth Circuit has adopted a narrower view of operator liability for parent corporations: "CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law." *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82 (5th Cir.

1990), *cert. denied*, 498 U.S. 1108, 111 S. Ct. 1017, 112 L.Ed.2d 1098 (1991). However, another panel of the same court recently observed, in *dicta*, that an individual shareholder or officer could be held directly liable as an operator:

> Under traditional concepts of corporate law, the principle of limited liability would protect officers or employees like [the shareholder here] from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding behind the corporate shield when, as "operators," they themselves actually participate in the wrongful conduct prohibited by the Act . . . . In such cases, a defendant can be held individually liable for his wrongful conduct. "[T]his personal liability is distinct from the derivative liability that results from 'piercing the corporate veil'" where we would hold the owners of a less than bona fide corporation responsible for corporate acts.

Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327, 330 (5th Cir.), *cert. denied*, 502 U.S. 1004, 112 S. Ct. 636, 116 L. Ed.2d 654 (1991).

I conclude, as the district court did, and as the First, Third, Tenth, and Eleventh Circuits have, that a parent corporation may be held directly liable as an operator of a contaminating facility under § 9607(a)(2) if the facts of the case show that its domination and control of the subsidiary corporation ostensibly operating the facility is so pervasive that the parent is the operator in fact.

II.

CPC's Liability under § 9607(a)(2)

The district court found that CPC, Ott II's parent corporation, so totally and completely controlled Ott II that CPC was the actual operator of the contaminating facility in Dalton Township, Michigan, and is therefore directly liable under § 9607(a)(2) as the operator of the site. I agree.

The facts, as found by the district court, are these:

From CPC's acquisition of Ott II in October 1965 through April 1966, all four directors on Ott II's board were CPC officers. Over the next three and one-half years, at least three of the eight board members were officers of CPC, and for the following two and one-half years, until CPC sold Ott II, CPC officials comprised the majority of the eleven-director board. At all times during Ott II's existence, the chairman of its board was a high-level CPC executive, appointed by CPC's president.

In addition, the managers of Ott II who exerted active control over the subsidiary's day-to-day activities also were officers of CPC. Arnold Ott, who had been chief executive officer of Ott I, continued as Ott II's chief executive officer until 1969, during which time he also was CPC's vice president for scientific research and president of CPC's development company, a subsidiary with oversight responsibility for several CPC subsidiaries including Ott II. In addition, James Eiszner, who had been Ott I's vice president of marketing. served as Ott II's president from 1967 to 1970. During Eiszner's tenure with Ott

II, he also served as vice president of CPC's development company, and eventually became CPC's chief executive officer. Moreover, Eiszner, in particular, was criticized during his tenure as an Ott II official for paying too much attention to his CPC responsibilities and not enough attention to Ott II. Beverly Warner served as Ott II's chief executive officer from 1970 until it was sold in 1972, at the same time serving as president of CPC's development company.

In addition to CPC's participation through Ott II's board in Ott II's environmental matters, CPC's environmental affairs director, G.R.D. Williams, was influential in setting Ott II's environmental policies. For example, because Williams did not believe Ott II needed a biological waste treatment facility, Ott II officers abandoned presenting plans for such a facility at a meeting with the state of Michigan. In addition, Williams repeatedly controlled the interface between Ott II officials and state and federal regulators, and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." 777 F. Supp. at 561.

Finally, as the district court found, CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to Ott II in excess of $5 million, while assuming many of Ott II's existing loans. In addition, CPC commingled its funds with Ott II's funds. CPC also limited the amount of capital expenditures that Ott II could approve without further approval by CPC's board of directors. As to personnel matters, CPC repeatedly participated in Ott II's labor negotiations with local unions.

Based on these and many other findings, the district court concluded that, "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 575. These findings are amply supported in the record. Accordingly, the district court's conclusion that CPC was directly liable under § 9607(a)(2) as an operator should be affirmed.

III.

Aerojet's Liability under § 9607(a)(1)

The district court found Aerojet liable as a present "owner" of a contaminated facility under § 9607(a)(1). It did so after finding that the facts justified piercing the corporate veil that thinly shielded Cordova/Michigan from Aerojet.

The majority opinion holds that the district court erred because it misapplied Michigan law: "[The district court's findings do] not suggest that Aerojet operated with a fraudulent purpose; such a fraudulent purpose is, as we read Michigan corporate law, a prerequisite to disregard of the corporate form." Maj. op. at 592 (citing *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 113 (6th Cir. 1989)).

While there is no question that fraud justifies piercing the corporate veil, there is ample authority under Michigan law for finding parent corporation liability through veil piercing for less egregious unjustified use of the corporate form.

The Michigan Supreme Court repeatedly has held that veil piercing is not limited to instances of fraud or illegality. In *Potter v. Michigan Bell Telephone Co.*, 246 Mich. 198, 224 N.W. 438 (1929), the court disregarded the corporate form despite recognizing that "[f]raud [wa]s expressly disclaimed." *Id.*, 224 N.W. at 439. In *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 26 N.W.2d 757 (1947), the court held that when a parent corporation's control of its limited purpose subsidiary is so complete as to result in the subsidiary being a "mere instrumentalit[y]," piercing is appropriate to avoid an injustice, even in the absence of fraud. *Id.*, 26 N.W.2d at 762-63.

More recently, the Michigan court affirmed that equity alone may require setting aside the corporate form. In *Wells v. Firestone Tire and Rubber Co.*, 421 Mich. 641, 364 N.W.2d 670 (1984), a plaintiff attempted to avoid the workers compensation exclusivity provision in Michigan law by bringing a tort action against the employer's parent corporation. The court rejected the attempt, invoking the piercing doctrine to find that the parent and employing subsidiary were a single corporate entity. As the court noted, the injustice to be avoided was abrogation of an overriding public policy interest.

> Our disregard of the separate corporate entities of Firestone and its wholly owned subsidiary is premised upon our recognition of the important public policies underlying the Michigan Worker's Disability Compensation Act and our belief that a contrary determination would be inequitable under the facts of this case. . . .

> If the statute is to be construed liberally when an employee seeks benefits, it should not be construed differently when the employer asserts it as a defense to a tort action brought by the employee who claimed and accepted benefits arising from that employment relationship. . . . Indeed, under the facts and circumstances of this case, we would not have permitted Firestone to shield itself behind its wholly owned subsidiary in order to avoid payment of workers' compensation benefits to plaintiff.

Id., 364 N.W.2d at 675. The *Wells* court did not require proof of a "fraudulent purpose."

Indeed, this court has observed, in *dicta* to be sure, that Michigan law permits veil piercing upon a showing of *any* of the following:

> (a) a corporation and shareholders have complete identity of interests; (b) the corporation is a mere instrumentality of the shareholders; (c) the corporation is a devise to avoid a legal obligation; or (d) the corporation is used to defeat public convenience, justify a wrong, protect fraud or defend a crime.

Bodenhamer Bldg. Corp., 873 F.2d at 112 (emphasis added).

Thus, while there is authority in Michigan for denying veil piercing where fraud is absent, *see Klager v. Robert Meyer Co.*, 415 Mich. 402, 329 N.W.2d 721 (1982), the weight of authority allows piercing when the shielding corporation is a mere instrumentality and justice requires that it be disregarded.

Here, the district court found that Aerojet was the 100 percent shareholder of Cordova/California who, in turn, was the sole shareholder of Cordova/Michigan. In addition, as the district court found, the boards of directors of Cordova/California and Cordova/Michigan were titular only, not even convening for meetings. At least twenty Aerojet officers simultaneously held the same or nearly identical positions in Cordova/California and Cordova/Michigan. Aerojet so completely controlled the finances of all companies, that neither Cordova/California nor Cordova/Michigan were permitted to maintain separate bank accounts. In addition, there was evidence that Aerojet used Cordova/Michigan by transferring to Cordova/California millions in worthless debt owed to Aerojet by Cordova/Michigan, effectively canceling debt owed by Aerojet to Cordova/California. These findings are supported by the record and are not clearly erroneous. The evidence established that Cordova/Michigan operated as a mere instrumentality of Aerojet.

Even more compelling are the findings of the district court regarding Cordova/Michigan's corporate purpose. When Aerojet began negotiations with MDNR for the Dalton Township property, Aerojet negotiated side-by-side with its then unincorporated division, Cordova. After Aerojet entered two short-term stipulations with MDNR, and merely eleven days before the sale was concluded, Aerojet incorporated Cordova as a wholly-owned subsidiary. Although Aerojet had initially drafted the stipulation and consent order with MDNR, it was "Cordova Chemical Company" that actually signed the agreement. Then, in November 1978, with the remodeling

of the facility complete and manufacturing about to begin, Cordova/California incorporated Cordova/Michigan, transferring to it Cordova/California's ownership of the facility. Despite the supposed separate corporate form of Cordova/Michigan, throughout operations, Aerojet actively participated in negotiations with prospective buyers for the possible sale of the facility. Once Cordova/Michigan ceased operations at the site, it was Aerojet that took responsibility for leasing portions of the site to third parties. Accordingly, it is clear that Aerojet took pains to insulate itself from environmental liability for the situation they knew existed at the site. Aerojet admits as much in their brief:

> By using well-capitalized, non-fraudulent, separate corporate subsidiaries, such as Cordova/California and then Cordova/Michigan, Aerojet could justify an attempt to reclaim and make the waste Site productive without risking all of its corporate assets. A rule of law imposing enormous environmental liability on parent corporations whose subsidiary neither perpetrated a fraud nor contributed to actual contamination would result in contaminated waste sites being permanently abandoned as unproductive, orphan properties, because no rational corporate officer could support a decision to rehabilitate a contaminated site if such liability were unavoidable.

Thus, Aerojet admits that Cordova/Michigan was established solely as a facade, to avoid any legal obligation to pay for further environmental cleanup at the site. Under Michigan law, their admission is sufficient to justify piercing the corporate veil. *See Potter*, 224 N.W. at 440.

As Aerojet points out, it is possible that a refusal to allow a prospective purchaser of a contaminated site to avoid liability will result in a scarcity of willing buyers. Certainly, both EPA and MDNR have a substantial interest in locating conscientious purchasers, who are willing to reclaim environmentally corrupt facilities. However, there is no evidence that the Michigan courts would view this interest as an exception to the state's veil piercing standard, especially in light of the competing interest in imposing environmental cleanup costs on private industry rather than on taxpayers. Congress certainly was not deterred by this argument, given its balancing of interests in favor of imposing liability on new owners. Moreover, Aerojet and the Cordovas are not blameless, as they would have the court believe. The district court found that the entities actively contributed to the contamination and then failed to take remedial action, despite knowledge that contamination was continuing to migrate.

Accordingly, the district court's conclusion that, by piercing the corporate veil, Aerojet may be held liable as an "owner" under 42 U.S.C. § 9607(a)(1) should be affirmed.

I further agree with the district court that Aerojet was directly liable as an operator under § 9607(a)(2):

> In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.

> As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.
>
> Accordingly, the court concludes the [sic] Aerojet is directly liable as an operator under section 107(a)(2).

CPC Int'l, Inc., 777 F.Supp. at 580.

IV.

Third Party Defense under § 9607(b)(3)

I do not agree that the district court should be required, upon remand, to "revisit its treatment of the [third-party] defense raised by Aerojet, Cordova/California and Cordova/Michigan" under § 9607(b)(3).

To succeed under § 9607(b)(3), the defendants are required to prove all four elements of a third party defense which are:

1. That they did not contribute to the contamination.
2. That they were not in a direct or indirect contractual relationship with any person who, in connection with the contractual relationship, caused the contamination.
3. That they exercised due care throughout their ownership or operation of the contaminating facility.

4. That they protected against those acts and omissions of the polluting persons, and the consequences of those acts and omissions, that were foreseeable.

See 42 U.S.C. §§ 9607(b)(3); *see also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994). The district court found that the defendants failed to carry their burden on all four elements of the § (b)(3) defense.

The majority opinion, in ordering that the district court "revisit its treatment of the defense" raised by the defendants, addresses only the "contractual relationship" ground. Even if the district court erred in its treatment of that element of the defense, its findings that the defendants have not carried their burden of proving the remaining three elements of the § 9607(b)(3) defense, which the majority opinion does not question, is amply supported in the record.

The district court committed no clear error in finding that the defendants demonstrated neither the exercise of due care nor the use of appropriate precautions. For example, in a May 1980 environmental risk report covering Aerojet and several subsidiaries including Cordova/Michigan, the defendants repeatedly stated their intent to take an ostrich approach with respect to the contamination problem:

> The most significant environmental problems associated with the facility are those relating to the residues of past industrial occupants of the site. Management has adopted the position that any injury to others arising out of contamination from these residues is the responsibility of the

> State of Michigan Department of Natural Resources and that, accordingly, Cordova should insulate itself from any knowledge of, or involvement in monitoring these wastes.

The report went on to acknowledge that waste drums remained buried, despite completion of MDNR's removal efforts. Moreover, the report acknowledged that the stipulation and consent order entered by Cordova and MDNR was never intended to resolve the contamination problem. In describing the responsibilities assumed by the parties under the stipulation and order, the report admitted that MDNR's duties were limited to removing 8700 drums and a portion of the contaminated soil and sludge, and that the consent order's hold harmless clause relieved the defendants only of liability arising out of these specified removal efforts. In addition, as the report acknowledged, the MDNR absolved the defendants of liability relating to procurement of an alternative community water source.

As the district court pointed out, and as the report confirms, the stipulation and order did not resolve responsibility for remaining drums and contaminated soil and sludge, as well as responsibility for groundwater contamination. In this regard, the report specifically opined:

> Between 65 and 100 monitoring wells for testing groundwater were either installed by Story or have been installed more recently under a State/Federal study of groundwater contamination at the site. The study is being carried out by several consulting organizations under contract to the state. Cordova management believes the studies show little or no contamination but has avoided

> any participation or liaison with the study teams . . . . Because of the possibility that Cordova's potential liability for groundwater contamination may have survived the Consent Order, it would appear desirable for Cordova management to keep abreast of current monitoring results. In addition, although a high chloride content would show continuation of problems from the old Story wastes, a high sulphate concentration would indicate seepage problems arising out of Cordova's current operations.

Accordingly, fully aware that waste drums remained buried beneath the site and that the majority of the contaminated soil had not been removed, and cognizant of groundwater contamination to which they may have been contributing, the defendants believed the solution to these problems was to wear blinders. Their head-in-the-sand approach can hardly be characterized as the exercise of due care.

For the same reasons, it cannot be said that the defendants took adequate precautions to protect against the consequences of Ott II's and Story's omissions and acts. While the parties, in their briefs, debate whether reimplementation of the purge wells would have been an adequate precaution, they overlook the big picture. The defendants, fully aware that contamination problems on their property were not being addressed, chose to take no precautions to protect against the foreseeable consequences of these problems—namely, further migration. Accordingly, because the defendants have failed to prove at least two of the requisite elements of the third-party defense, the district court properly held that they were not entitled to invoke it.

Since the defendants were required to prove all four elements of the defense, it is unnecessary to consider whether they sustained their burden regarding the remaining two elements, including whether any of the pollution was the act of a third party "in connection with" the contractual relationship with the defendants.

V.

I would affirm the judgment of the district court.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-2288/2326

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN, ET AL.,
DEFENDANTS-APPELLANTS

CPC INTERNATIONAL INC., DEFENDANT-APPELLEE

ARNOLD C. OTT, ET AL., DEFENDANTS

MICHIGAN DEPT. OF NATURAL RESOURCES,
DEFENDANT-APPELLEE

[Filed: Oct. 19, 1995]

Before: MERRITT, Chief Judge; KENNEDY, MARTIN, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

Prior report: 59 F.3d 584

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly it is **ORDERED** that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

(3)

Supreme Court, U.S.
FILED
OCT 8 1997
CLERK

No. 97-454
In the Supreme Court of the United States
October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

CPC INTERNATIONAL, INC., et al,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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ARGUMENT

Respondent, Michigan Department of Environmental Quality ("MDEQ"), formerly known as the Michigan Department of Natural Resources, concurs in the United States' Petition for Writ of Certiorari, as it pertains to seeking review of the United States Court of Appeals for the Sixth Circuit's *en banc* decision regarding the liability of Respondent CPC International, Inc. Respondent MDEQ filed a Petition for Writ of Certiorari on August 8, 1997, seeking review of the liability determination as it relates to CPC International, Inc., Docket No. 97-296.

As set forth in both the United States' and MDEQ's Petitions for Writ of Certiorari, the Court of Appeals decision presents an important question of federal law and a clear conflict between the Courts of Appeals. The issue at hand is whether a parent corporation can be held directly liable as an operator under section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(2), when it was actively and directly involved in operations at the facility, to such an extent that the trial court found that "the evidence of participation and control by CPC exceeded the bounds of an interested investor and entered the realm of active operator". *CPC International Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 575 (W.D. Mich. 1991); App. to MDEQ Pet. 126a. Both MDEQ's and the United States' Petitions seek review of the fundamental principles of liability under CERCLA; specifically what it means to be an "operator" under CERCLA and how courts should interpret CERCLA's broad definition of "person".

The Court of Appeals interpretation of CERCLA is in direct conflict with five other Courts of Appeals that have found parent corporations directly liable as operators under CERCLA. *See*: *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671 (2d Cir. 1996); *Schiavone v. Pearce*, 70 F.3d 248 (2d Cir. 1996); *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), *cert. denied*, ___U.S.___; 117 S. Ct. 50 (1996); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), and

United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990); *but see Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80 (5th Cir. 1990).

CONCLUSION

For the reasons set forth above and in MDEQ's Petition for Writ of Certiorari in No. 97-296, Respondent MDEQ respectfully requests that this Court grant the United States' Petition for Writ of Certiorari with respect to Respondent CPC International, Inc. Respondent MDEQ takes no position with respect to Petitioner United States' request that this Court grant its petition with respect to Aerojet-General Corp.

Respectfully submitted,

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October, 1997

Supreme Court, U.S.
FILED
NOV 12 1997
CLERK

(2) (4) (2)

Nos. 97-296, 97-454 and 97-464

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA (#97-454) and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (# 97-296),
Petitioners
v.
CPC INTERNATIONAL, INC., et al.
Respondents
and
CPC INTERNATIONAL, INC. (# 97-464),
Cross-Petitioner
v.
AEROJET-GENERAL CORPORATION, et al.,
Respondents

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY OPPOSING PETITIONS

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RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

SUPPLEMENTAL STATEMENT OF THE CASE

This case involves the allocation of responsibility for pollution caused by prior owners and operators of a site now owned by Cordova Chemical Company of Michigan, a subsidiary of Cordova Chemical Company, which is in turn a subsidiary of Aerojet-General Corporation ("Aerojet"). Neither Aerojet nor any of its subsidiaries caused or contributed to any contamination at the site. All of the contaminants in the soil and groundwater of the site were deposited between 1957 and 1977, before Aerojet or its subsidiaries had any involvement whatsoever with the site.

Neither Aerojet nor its subsidiaries should bear any liability for the contamination caused by others at the site. The district court recognized that Aerojet's subsidiaries operated in an environmentally safe manner, and found as a matter of fact under Fed. R. Civ. P. 52 that:

> During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

CPC Int'l Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 556 (W.D. Mich. 1991) (U.S. Pet. App. 62a). The Court of Appeals noted the finding, *United States v. Cordova Chemical Co. of*

Michigan, 113 F.3d 572, 576-77 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 6a), and no party contested it on appeal. As the Court of Appeals stated: "[T]he release of hazardous substances appears to have been *caused* solely by the predecessors of [Aerojet and its subsidiaries]." *Id.* at 583, U.S. Pet. App. 23a-24a. Aerojet itself has never owned this site or conducted its operations there.

Aerojet and its subsidiaries initially became involved with the site in 1977 when Cordova Chemical Company purchased it from a federal bankruptcy trustee under a Stipulation and Consent Order with the State of Michigan. Under the Stipulation and Consent Order, Cordova Chemical Company agreed to contribute $600,000 to the State's cleanup efforts at the site, and the State of Michigan promised to release Cordova and hold it harmless from all potential liability for pollution left by the site's prior owners:

> 6. It is anticipated that said $600,000 will be sufficient to reimburse the Department of Natural Resources fully for all costs and expenses incurred by it in connection with its obligations hereunder and, in addition, to provide at least $100,000 towards the provision of an alternative water supply system to serve residents and commercial establishments whose water supply wells are or may become affected by the groundwater contaminants emanating from the Story Chemical Corporation property. The Cordova Chemical Company shall not have any liability in the event that said $600,000 is not in fact sufficient for the intended purposes nor shall it have any responsibility whatsoever in connection with the provision of any water supply system or potable water pending availability of an

acceptable water supply system to said residents and commercial establishments.

Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation, the creation, maintenance and operation of any purge wells.

. . .

8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwater or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order, whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.

See CPC, 777 F. Supp. at 565 (U.S. Pet. App. 86a-87a) (quoting from the Stipulation and Consent Order). Without this promise from the State of Michigan, Cordova Chemical Company would not have acquired the site.

The Michigan Court of Appeals has ruled that the Stipulation and Consent Order obligates the State to bear financial responsibility for any CERCLA liability assigned to Aerojet and its subsidiaries. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (1995). The Michigan Supreme Court has denied the State's request for leave to appeal. *See Cordova Chemical Co. v. State, Michigan Department of Natural Resources*, 453 Mich. 899, 554 N.W.2d 319 (1996). Accordingly, the question presented by the Petition of the United States and the Conditional Cross-Petition of CPC International is, for Aerojet, of primarily academic interest because ultimate financial responsibility for any CERCLA liability assigned to Aerojet will lie with the State.[1]

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[1] The State of Michigan's Petition seeks certiorari only with respect to the claims against CPC International, and not with respect to the claims against Aerojet and its subsidiaries. The State's Petition recognizes the reality that only CPC International, and not Aerojet, has a significant enough financial interest in the question to present the adversity necessary for proper presentation of the issue in this Court. Indeed, Aerojet's lack of a significant financial interest in the outcome of the claims against it may well lead this Court to deny the Petitions as moot insofar as they involve the claims against Aerojet. *Cf.* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 18.2 at 710 (7th ed. 1993) ("If the controversy becomes academic by reason of changed circumstances, the Court's jurisdiction ceases and the case becomes moot."); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.2, at 241 n. 28 (2d ed. 1984) (collecting cases in which relief granted by another tribunal mooted an action).

REASONS FOR DENYING THE PETITIONS

1. This case does not present a sufficiently important question of federal law to warrant the attention and resources of the Court. The appropriate standard for determining the liability of a parent corporation as an "operator" under § 107(a)(2) of CERCLA is not an issue likely to arise with great frequency in the federal courts in the future. As the Petitioner acknowledges, "the United States does not routinely seek to hold parent corporations liable for conditions at a subsidiary's facility." U.S. Pet. at 26-27. Indeed, the courts of appeals have noted that it is only in unusual cases that a parent corporation may be subjected to such liability. "[I]t is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary." *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990); *see also Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993) (same). Moreover, the frequency of such cases will be further minimized as the overall number of CERCLA cases in the federal courts decreases along with a decrease in the number of Superfund sites.[2]

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[2] The number of sites added annually to the National Priorities List ("NPL") has been steadily decreasing since the NPL's inception in 1983. From 1983-1990, the United States Environmental Protection Agency added an average of over 151 sites per year to the NPL. From 1991-1997, the annual average has declined to approximately 20. The following graph summarizes the annual data:

Even to the extent that such cases do continue to arise, existing decisions of the courts of appeals already provide a consistent answer to the abstract question presented by the Petitioners. The United States frames the question presented for review as "[w]hether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's

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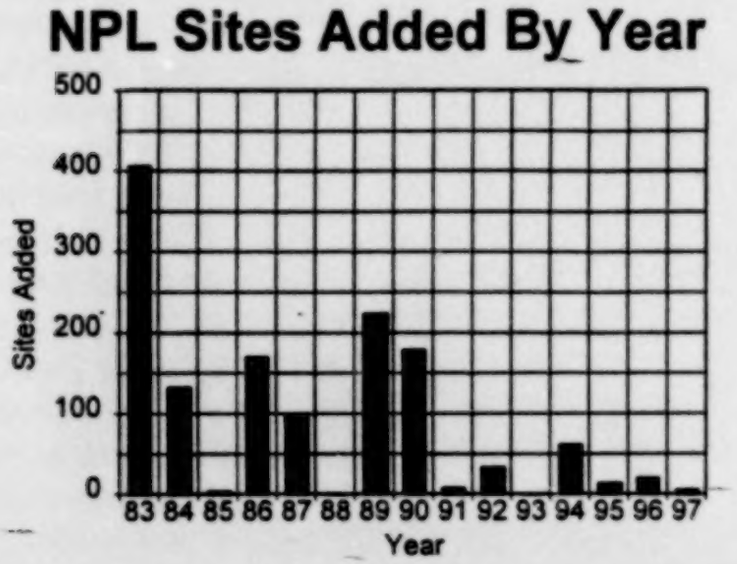

See Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Pub. No. 9320.7-061, Supplementary Materials: National Priorities List, Proposed Rule and Final Rule 25-29 (April 1997); 62 Fed. Reg. 50,442 (1997) (adding six sites to NPL in September of 1997). The trend is likely to continue. *See e.g.*, 114 Cong. Rec. S11336-01 (1995) (remarks of Senator Bond) (noting that the EPA's budget is decreasing and that Superfund will take its share of the cuts and thus needs to prioritize among NPL sites); *see also* S.8, 105th Cong., 1st Sess. § 802 (1997) (pending Superfund reauthorization bill which would cap the number of new NPL sites, decreasing to no more than 10 per year after the year 2000).

facility." U.S. Pet. at (I). Respondents respectfully submit that a careful review of the court of appeals decisions cited by the United States (U.S. Pet. at 22-26) reveals that all the circuits would answer the abstract question presented in the affirmative.[3] It is true that the language and theory used to apply the abstract principle to the particular facts of a case may vary from circuit to

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[3] The United States acknowledges this with respect to eight of the eleven circuits to address the issue. U.S. Pet. at 22-25 (citing holdings from the First, Second, Third and Eleventh Circuits and *dicta* from the Seventh, Eighth, Ninth and Tenth Circuits). In addition, the Sixth Circuit in this case recognized the validity of a direct theory of operator liability for parent corporations and specifically rejected the dissent's attempt to characterize the decision as holding otherwise. *See United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 579, 581 n. 5 (6th Cir. 1997) (*en banc*) (U.S. Pet App. 12a, 17a-18a). As the United States notes (U.S. Pet. at 25-26), it is not entirely clear how the Fifth Circuit would articulate its position on this point, but it is clear that the Fifth Circuit, like the other circuits, would impose CERCLA liability on a corporation whose active participation in and control over a subsidiary's operations was sufficient on the facts of a particular case to warrant disregard of the corporate form under applicable veil-piercing principles. Accordingly, the Fifth Circuit would also answer the question framed by the United States in the affirmative on the facts of an appropriate case. The Fourth Circuit, according to the United States, "has adopted a more expansive standard of operator liability," U.S. Pet. at 25, and so would obviously answer the abstract question framed by the United States in the affirmative. The District of Columbia Circuit has not addressed the issue and is unlikely to have the opportunity given the concentration of federally owned property and the absence of significant industrial property in the District. *See* 42 U.S.C. § 9613(b) (specifying venue for cost recovery actions in districts where the release of hazardous substances occurred or where the defendant resides, may be found, or has its principal office). There are no District of Columbia sites on the NPL. 40 C.F.R. § 300, Appendix B (1997).

circuit, but there does not appear to be any dispute among the circuits over the proposition that a company may under some circumstances bear liability for a subsidiary's facility.[4] This Court

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[4] Contrary to the claim of the United States (U.S. Pet. at 25), the Fourth Circuit's decision in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, *cert. denied*, 506 U.S. 940 (1992), does not deepen the claimed conflict among the circuits over the treatment of parent companies under CERCLA § 107(a)(2). *Nurad* does not even deal with the operator liability of parent companies under CERCLA. The relevant portion of *Nurad* deals with the alleged operator liability of former tenants of a contaminated site and former officers of the corporate owner. *Id.* at 842-844. Moreover, in *Nurad*, the Fourth Circuit declined to impose operator liability on the facts of the case under an "authority to control" test of operator liability. Accordingly, any dispute over whether the appropriate test was "authority to control" or "actual control" was academic since neither test supported a finding of liability. *See Nurad*, 966 F.2d at 842 (affirming summary judgment for the former tenant based on the absence of authority to control waste disposal, and further noting the district court finding that the former tenants "never actively participated in the disposal of hazardous substances at the site").

The only other Fourth Circuit decision to address any form of CERCLA operator liability is *United States v. Carolina Transformer Co., Inc.*, 978 F.2d 832 (1992), a case dealing with the liability of officers and directors of a corporate owner and operator. (One of the officers and directors was also the sole shareholder of the company, but the court declined to analyze liability on that basis. *Id.* at 836.) *Carolina Transformer* articulated its decision using an "authority to control" standard, *id.* at 836-837, but the facts found by the trial court and referenced by the Court of Appeals may well have supported the imposition of liability on other grounds. Both individual defendants admitted they were responsible for what happened at the site, and one actually admitted that he "operated or otherwise controlled operations" at the site. *Id.* at 837. The district court findings referenced by the Court of Appeals, *id.*,

should not spend its time as linguistic police requiring that the circuits rigidly adhere to a particular verbal formula.

The United States suggests that the *en banc* decision of the Sixth Circuit is out of step with other court of appeals decisions[5] in its focus on the traditional corporate law concept of derivative liability through veil-piercing as a basis for assigning liability to a parent corporation. But the Sixth Circuit expressly refused to reduce parent corporation liability under CERCLA to a veil-piercing question in every case. To the contrary, just like the decisions of other courts of appeals (*see* U.S. Pet. at 22-25), the Sixth Circuit recognizes the possibility of direct operator liability for a parent company. In fact, the Sixth Circuit specifically stated at two points in its opinion that a parent corporation can be held directly liable as an operator where it "actually" or "directly" operated the facility at issue, either independently of the subsidiary

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detail more nefarious conduct including surreptitious operation of a subsidiary as a division of Carolina Transformer, a fraudulent attempt to divest Carolina Transformer of assets, and destruction of corporate records. *United States v. Carolina Transformer Co., Inc.*, 739 F. Supp. 1030, 1034-1035 (E.D.N.C. 1989). In such a case, the articulation of an "authority to control" standard was certainly not the controlling factor in the decision. Indeed, the United States says it does not support an "authority to control" standard, U.S. Pet. at 25, and so it would certainly not have brought the *Carolina Transformer* case in the absence of facts supporting liability on other grounds.

[5] U.S. Pet. at 22-25 (citing *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth*, 996 F.2d 1107 (11th Cir. 1993)).

or as an actual co-operator alongside the subsidiary. *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 579, 581 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 12a, 17a-18a). Moreover, the court's majority took the dissent to task for suggesting that it was holding otherwise, stating that "the dissent's characterization of our opinion as holding 'that a parent cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned by its subsidiary corporation' is mistaken." *Id.* at 581 n.5 (U.S. Pet. App. 17a). The Sixth Circuit simply did not find such a direct liability theory implicated by the claims and facts of this particular case. *Id.* This Court should not spend its time poring over a particular factual application of accepted legal principles.

In any event, the distinction Petitioner attempts to create between a standard based upon derivative liability through veil-piercing and one of direct liability is more theoretical than real. Commentators who have compared cases relying upon the traditional veil-piercing criteria with those purporting to apply a direct liability standard have found no difference in the result of the cases based upon this difference in approach. "[T]he liability of a parent corporation is the same regardless of whether liability is premised on traditional corporate law or direct statutory liability under CERCLA." Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 315 (1992); *see also* George W. Dent, *Limited Liability and Environmental Law*, 26 Wake Forest L. Rev. 151, 160 (1991) ("In theory, [direct liability] differs from liability under piercing . . . . In practice, however, the two can be hard to distinguish. The kind of participation in a CERCLA violation necessary to establish direct liability may differ little from the kind of involvement in the subsidiary's affairs

necessary to pierce the veil"). According to the commentators, "careful analysis of the fact patterns of these cases [purporting to apply a distinctly federal, direct liability standard] discloses that courts have simply held liable parties that could have been held liable under traditional corporate law doctrine." Oswald & Schipani, *supra*, at 236. Respondents respectfully submit that this Court should not devote its time to resolving an abstract question that has no real impact on the outcome of actual cases.

Because the question presented for review by the Petitioners is not frequently recurring in nature, because all the courts of appeal, including the Sixth Circuit, recognize the potential for both direct and derivative theories of liability,[6] and because the apparent difference between the direct and derivative standard of liability is of little practical import, this case does not warrant the attention and resources of this Court. Accordingly, the petitions should be denied.

2. Even if this Court decides to address the question presented by the Petitioners, it should do so only with respect to CPC International and not with respect to Aerojet. First, in Aerojet's case, unlike the case against CPC, resolution of the question presented in favor of the Petitioner should not change the outcome in favor of Aerojet. Even if Aerojet is deemed an "operator" under CERCLA § 107(a)(2), the judgment in favor of

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[6] The Fifth Circuit focused solely on derivative liability of a parent corporation through veil-piercing in *Joslyn v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), but that court has more recently recognized the potential for both direct and derivative liability in the analogous case of a majority shareholder. *See Riverside Market Development Corp. v. International Building Products, Inc.*, 931 F.2d 327 (5th Cir. 1991).

Aerojet should still be sustained on other grounds. Moreover, even if Aerojet were ultimately found liable, the State of Michigan, and not Aerojet, would bear the ultimate financial burden of the ruling. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (1995). This dilutes the adversarial nature of the case against Aerojet necessary for careful adjudication of the issues. This also means that the taxpayers will bear financial responsibility for any liability ultimately imposed on Aerojet and its subsidiaries—precisely the result the United States says it seeks to avoid in bringing its Petition. U.S. Pet. at 27. Accordingly, a grant of certiorari in this case on the claims against Aerojet would not be an effective use of this Court's resources.

a. Aerojet has consistently argued that it cannot be liable under § 107(a)(2), regardless of whether it is deemed an "operator," because no disposal of hazardous substances occurred at the site during the tenure of its subsidiaries. Section 107(a)(2) imposes liability only on owners or operators "at the time of disposal of any hazardous substance." 42 U.S.C. § 9607(a)(2). Petitioners have asserted that the passive migration in groundwater of contaminants left by others amounts to "disposal." The Sixth Circuit did not have to address this issue because it held that Aerojet was not an operator.

Two courts of appeals have recently ruled, consistent with Aerojet's position, that passive migration is not "disposal" under CERCLA. *See ABB Industrial Systems Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997); *United States v CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996). The Second Circuit succinctly summarized the numerous factors that support such a conclusion:

First, disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing" of hazardous chemicals so that they may enter the environment. 42 U.S.C. § 6903(3). None of these terms is commonly used to refer to the gradual spreading of hazardous chemicals already in the ground. *CDMG Realty Co.*, 96 F.3d at 714.

Second, current owners are liable, if, *inter alia*, there has been a "release" of hazardous substances. 42 U.S.C. § 9607(a). Unlike the definition of disposal, release is defined to include "leaching," *id.* § 9601(22), which is commonly used to describe passive migration, see *CDMG Realty Co.*, 96 F.3d at 715 & n.4 (quoting several law journals and cases). That Congress used the term leaching in the definition of release demonstrates that Congress knew that passive migration occurred but decided not to impose liability for it on prior owners. *Id.*

Third, CERCLA provides an "innocent owner" defense. *See* 42 U.S.C. §§ 9607(b)(3), 9601(35); *Westwood Pharmaceutical v. National Fuel Gas Dist. Corp.*, 964 F.2d 85, 89-91 (2d Cir. 1992). To qualify for that defense, a defendant must establish, *inter alia*, that it acquired the site "after the disposal" of hazardous chemicals. 42 U.S.C. § 9601(35)(A). If "disposal" included the gradual spreading of hazardous chemicals spilled before the defendant acquired the site, the innocent owners defense would hardly ever be available. *CDMG Realty Co.*, 96 F.3d at 716. Once hazardous chemicals are in the ground, they usually

spread, and therefore, there would almost never be an identifiable period "after the disposal." *Id.* Congress would not intentionally create a useless defense. Thus, we interpret the word "disposal" as limited to spilling, discharging, leaking, etc., and not to passive migration. *See Id.*

. . . .

Finally, the *CDMG Realty Co.* Court reasoned that its interpretation was consistent with CERCLA policy. One of CERCLA's goals is to "force polluters to pay the cost associated with their pollution." *CDMG Realty Co.*, 96 F.3d at 717; *see also B.F. Goodrich*, 99 F.3d at 514 (CERCLA's purposes include "assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions"). If a person merely controlled a site on which hazardous chemicals have spread without that person's fault, that person is not a polluter and is not one upon whom CERCLA aims to impose liability.

ABB, 120 F.3d at 358-59; *see also* Note, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609 (1994).[7] Accordingly,

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[7] *But cf. Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (leaking from tanks that were deposited prior to the defendant's ownership constitutes "disposal" subjecting the defendant to CERCLA liability). *Nurad* did not address precisely the same question presented by the facts of this case. In *Nurad*, additional contaminants entered the environment from leaking containers. 966 F.2d at 846 (former owners held property "at a time when the mineral spirits were 'leaking' from the tanks"). In this case, all of the contaminants at issue were

even if the Sixth Circuit's "operator" analysis were reversed and Aerojet were deemed to be an operator, no liability would attach to Aerojet since the passive migration of contaminants left by others does not constitute disposal within the meaning of the statute.

b. Even if the operator liability and disposal issues were resolved against Aerojet, it would still not be subject to liability because Aerojet and its subsidiaries qualify for the third party defense available under § 107(b)(3) of CERCLA for parties that neither caused the contamination nor had a disqualifying contractual relationship with those who did. Section 107(b)(3) provides that:

> (b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned,

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already in the soil and groundwater of the site before Aerojet's subsidiary acquired the property in 1977. The question, then, is whether natural migration of contaminants already released into the environment amounts to new "disposal." As the Second Circuit noted in ***ABB***, such a broad reading of the term would effectively eliminate other provisions in the statute.

> taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b). Aerojet and its subsidiaries meet each of the requirements of this defense because Aerojet and its subsidiaries (1) did not cause contamination at the site; (2) did not have a disqualifying contractual relationship with those who did; and (3) did conduct themselves reasonably at the site consistent with the Stipulation and Consent Order with the State of Michigan. The Sixth Circuit has instructed the trial court to reconsider the applicability of this defense on remand. *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 583 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 23a-24a). Accordingly, even if all other issues were resolved adversely to Aerojet, the judgment of the Sixth Circuit in favor of Aerojet should still stand.

c. Petitioner asserts that an important purpose of CERCLA is to relieve the taxpaying public of the burden of bearing cleanup costs at polluted sites. Indeed, Petitioner asserts that "this case illustrates precisely why" parent corporations should be subject to liability as operators in some cases—to avoid situations in which "the general public must assume the costs of cleanup." U.S. Pet. at 27. But the facts of this case belie such a characterization as to Aerojet because a taxpaying public will ultimately bear the cost even if Aerojet is deemed liable. The Michigan Court of Appeals has ruled that the State of Michigan must reimburse Aerojet and its subsidiaries for any CERCLA liability they incur. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App.

144, 536 N.W. 2d 862 (1995), *lv. denied*, 453 Mich. 899, 554 N.W.2d 319 (1996). Thus, it is taxpayers who will bear ultimate financial responsibility for any liability assigned to Aerojet and its subsidiaries. As such, review by this Court of the claims against Aerojet cannot advance the very policy Petitioner claims to advance with its Petition.

3. This Court should in any event deny the Conditional Cross-Petition of CPC International because CPC has no proper interest in seeking review of a judgment in favor of Aerojet and against the State of Michigan that the State itself is content to accept. A party must generally assert only its own legal rights, not those of other parties. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1981); *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). A party must also have a sufficient personal stake in the outcome of a controversy to warrant its invocation of the Court's jurisdiction. *See Warth v. Seldin*, 422 U.S. 490 (1975). CPC's only asserted interest in seeking review of this issue as to Aerojet is to advance its claim for contribution against Aerojet. But CPC chose to abandon that claim in this litigation based on a partial settlement with Aerojet. *See* Stipulation and Order (April 15, 1992) at ¶ 6, Mich. Pet. App. 83a ("Since Aerojet-General Corp. and CPC International Inc. have reached a voluntary settlement that allocates past response costs between them, this Stipulation and Order constitutes a disposition of all legal and factual issues before the Court in phase II of the consolidated action."). Accordingly, the district court dismissed all claims between CPC and Aerojet in this case without prejudice. *See* Final Judgment (September 10, 1992) at ¶ 8 (Mich. Pet. App. 80a-81a). CPC may now regret its earlier decision to abandon its contribution claims in this case, but that regret does not create a proper basis for this Court to review a

judgment between Aerojet and the State of Michigan that both Aerojet and the State are content to accept.

CONCLUSION

The Petition for Writ of Certiorari filed by the United States (No. 97-454) should be denied. Alternatively, even if the Court decides to grant this petition, it should do so only with respect to the claims against CPC. The Court should further deny the Conditional Cross-Petition of CPC (No. 97-464).[8]

November 10, 1997

Respectfully submitted,

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[8] No relief is sought against Aerojet or its subsidiaries in the Petition of MDNR (No. 97-296).

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Nos. 97-296 and 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL INC.,
ET AL., RESPONDENTS

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
PETITIONER

v.

CPC INTERNATIONAL INC., RESPONDENT

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT CPC INTERNATIONAL INC. IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, CPC International Inc. participated so pervasively in the day-to-day management of the chemical manufacturing plant owned and operated by its wholly-owned subsidiary that CPC "operate[d]" the subsidiary's "facility" within the meaning of Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the captions, the respondents in No. 97-454 are Aerojet-General Corporation, Cordova Chemical Company of Michigan, and Cordova Chemical Company. The petitioner in No. 97-296, the Michigan Department of Environmental Quality, formerly was known as the Michigan Department of Natural Resources. See No. 97-296 Pet. ii. For consistency with the petition in No. 97-296 and the proceedings in the courts below, we will continue to refer to the State agency as the "MDNR."

Respondent CPC International Inc. has no parent companies and has the following nonwholly owned subsidiaries:

Circulo Esmeralda, S.A. de C.V.
Corn Products Co. (India) Ltd.
Maghreb Alimentation S.A.
Maizena Brasil S.A.
Productos Modificados, S.A. de C.V.
Refinacoes de Milho, Brasil Ltda.
Refinerias de Maiz SAICF
S.B. Penick del Ecuador S.A.

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BRIEF FOR RESPONDENT CPC INTERNATIONAL INC. IN OPPOSITION

This Court has repeatedly declined to review the inherently fact-bound question whether a particular corporate or individual owner of a corporation should be subjected to "operator" liability under CERCLA where the owned corporation operated a "facility" at which hazardous waste is located.[1] The petitions in this case present no reason for the Court to depart from that prudent and consistent course. Moreover, as the decreasing frequency of the petitions indicates, the issue is losing rather than gaining importance, further reducing the need for this Court to sort out the facts of this case.

STATEMENT

This case involves the allocation of liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), for the cleanup of a site near Muskegon, Michigan. Four separate successive owners manufactured chemicals at the Muskegon site: Ott Chemical Co. ("Ott I"), from 1957 to 1965; Ott Chemical Co. ("Ott II"), a wholly-owned subsidiary of respondent CPC International Inc., from 1965 to 1972; Story Chemical Co., from 1972 until it went bankrupt in 1977; and two wholly owned subsidiaries of cross-respondent Aerojet-General Corp. — Cordova Chemical Co. ("Cordova/California") and Cordova Chemical Co. of Michigan ("Cordova/Michigan") — from 1977 to 1986. U.S. App. 3a-4a.[2]

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[1] See *Livingstone* v. *Donahey*, No. 93-428, granted, vacated and remanded for reconsideration of attorney fee award, 512 U.S. 1201 (1994); *Riverside Market Ltd. Partnership* v. *Prescott*, No. 91-458, cert. denied, 502 U.S. 1004 (1991); *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, No. 89-1973, cert. denied, 498 U.S. 1108 (1991); *Powerline Supply Co.* v. *T.L. James & Co.*, No. 90-69, cert. denied, 498 U.S. 1108 (1991); *Kayser-Roth Corp.* v. *United States*, No. 90-816, cert. denied, 498 U.S. 1084 (1991).

[2] "U.S. App." refers to the appendix to the petition in No. 97-454.

A. Factual Background

1. Ott I manufactured a variety of synthetic organic chemicals at its Muskegon facility. See U.S. App. 63a. In 1963, the chairman of CPC (then known as Corn Products Company), which specialized in wet-milled corn products, joined the Ott I board. *Id.* at 64a. In 1965, a subsidiary of CPC purchased the assets of Ott I and then adopted the Ott name. *Id.* at 65a.

Ott II continued Ott I's operations at the Muskegon site (U.S. App. 66a); later, it also operated a chemical manufacturing plant in Charlotte, North Carolina. *E.g.*, C.A. App. 2329, 2334, 2340-2343. As the district court found, "[t]he officers of Ott II remained identical to the officers of Ott I[.] * * * Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility." U.S. App. 66a.

The Ott II board of directors was "an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner." U.S. App. 67a. In particular, "[t]he board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal." *Ibid.*

Arnold Ott, president of Ott I, and James Eiszner, a vice president, assumed duties for CPC while retaining their positions with Ott II. U.S. App. 68a. Ott remained closely involved with the company that bore his name. He remained president of Ott II through 1966 and was its CEO and chairman of the board through 1969. *Id.* at 68a, 70a, 72a. Ott remained on the Ott II board after he resigned from CPC in 1969 (C.A. App. 731) and continued to advise his successors in management — actions that the district court attributed to his former employer, CPC. See U.S. App. 73a.

CPC's acquisition of Ott I typified the 1960s fashion for conglomerate acquisitions. CPC acquired a number of companies in businesses that were unrelated to wet-milled corn products, CPC's core business. The acquired companies were loosely federated within the Corn Products Development Company ("CP Development"), a division of the parent corporation. U.S. App. 70a. CP Development oversaw six CPC subsidiaries (including Ott II) and a research center. C.A. App. 3325-3326, 3331-3332, 3419-3420. CP Development reviewed Ott II's financial performance, projections, and large capital expenditure requests. U.S. App. 72a-73a. Like any substantial investor, CP Development "exert[ed] pressure [on Ott II] to generate more profits and enhance performance." *Id.* at 72a.

Unsurprisingly, some officers of Ott II, including Ott and Eiszner (who succeeded Ott as president of Ott II), held positions in the division that supervised Ott II; Ott was the first president of CP Development. U.S. App. 72a. Eiszner's successor as president of Ott II, Beverly Warner, moved in the other direction from president of CP Development to CEO of Ott II. *Ibid.* There was *no* evidence, however, that CP Development and Ott II were in any sense a single integrated enterprise.

Like virtually all parent corporations, CPC placed some employees on its subsidiary's board of directors. U.S. App. 67a-68a. If Ott I officers Ott and Eiszner are counted as CPC representatives, CPC employees at times made up a majority of the Ott II board. *Ibid.*; see C.A. App. 736-737. Only one of the CPC officers who served on Ott II's board was also a director of CPC (*id.* at 731-732, 736-737), however, and there was no evidence that CPC used its employment relationship with some Ott II directors in order to control Ott II's corporate policy.

To the contrary, Ott II corporate officers set the day-to-day operating policies for the company without any supervision or approval by CPC. See U.S. App. 69a. Until 1970, those officers included no CPC employees not drawn from Ott I. C.A. App. 738-740. Indeed, minutes from a 1967 Ott II board meeting

indicate that, according to CPC's chairman, the parent company did "not want[] to 'meddle' with" Ott II. C.A. App. 2210.

Actual practice accorded with this policy. The district court found that "[t]he Ott II management formulated and implemented the company's day-to-day operating policies" across the whole range of activities, "including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and," significantly for present purposes, "environmental matters." U.S. App. 69a.

2. Ott I discharged most of its industrial waste into seepage lagoons. See U.S. App. 60a-61a. Ott II took several steps to improve the waste disposal system. For example, it added and then redeveloped purge wells to confine and remove contaminated ground water, and it built an in-plant waste collection system and an equalization basin. C.A. App. 2228-2234. Ott II's state-of-the-art efforts to control its waste disposal were the subject of a technical journal article that concluded that the new system "achieved the goal of preserving the environment." Burt, *The Use, Abuse and Recovery of a Glacial Aquifer*, GROUND WATER, Jan.-Feb. 1972, at 65, 65.

CPC was not involved in the design or implementation of these projects. A CPC employee, G.R.D. Williams, attended a single meeting between Ott II personnel and Michigan Water Resources Commission staff in 1966. U.S. App. 75a. Uncontradicted testimony showed that Williams "had absolutely no responsibility or no authority within the Ott Chemical Company," but was "basically * * * a clerical figure who was keeping a record of all of the pol[l]ution control problems existing" in CPC and its subsidiaries. C.A. App. 2893-2894. Williams "had nothing to do with the development of [Ott II's] control of waste," but "was given copies after the fact of decisions which [Ott II] had reached." *Id.* at 2895-2896, 2914-2915. In CPC's view, Williams "could consult and he could advise, but he couldn't require anybody in any location to do anything." *Id.* at 3269; see also *id.* at 2995-2996.

3. After CPC had agreed in principle on December 31, 1971, to sell Ott II to the Story Chemical Company, CP Development essentially acted as Story's agent in overseeing Ott II. U.S. App. 72a, 74a. Although the day-to-day internal management of Ott II was unchanged (C.A. App. 3356), Ott II managers were "advised not to implement any changes in activity" without consulting CPC (U.S. App. 74a) so as to prevent the dissipation of assets for which Story had agreed to pay a set price (C.A. App. 3355).

Story acquired Ott II in 1972. U.S. App. 78a. Within two years, Story no longer used the purge well system regularly, accelerating the contamination of the property. *Ibid.*

The Michigan Department of Natural Resources (MDNR) turned its attention to the Muskegon site after Story's bankruptcy in 1977. U.S. App. 79a. MDNR sought a buyer for the Muskegon site that could contribute to the cleanup process. *Id.* at 81a. Aerojet, which sought a facility to make a chemical for its Cordova Chemical Company division, negotiated with MDNR and the bankruptcy trustee. *Id.* at 81a-82a. Aerojet incorporated the Cordova Chemical division as Cordova/California in October 1977; Cordova/California purchased Story's assets shortly thereafter, entering into a side agreement with MDNR. *Id.* at 82a-83a. Cordova/California incorporated Cordova/Michigan as a subsidiary in 1978, and transferred the Muskegon plant to the subsidiary. *Id.* at 94a.

B. Proceedings Below

1. Several CERCLA claims, counterclaims, and cross-claims were raised in a consolidated action in the United States District Court for the Western District of Michigan. In 1991, the district court found CPC, Aerojet, Cordova/California, and Cordova/Michigan jointly and severally liable for cleanup costs at the site. U.S. App. 128a-129a.

The district court held that CPC was liable as an "operator" of the Muskegon facility under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). In the court's view, "section 107(a)(2)

liability may attach to a parent corporation in two ways": direct liability, or liability through common law veil-piercing. U.S. App. 103a-104a. The court concluded that the statutory terms "owned or operated" somehow "forge[d] a new, middle ground" of liability (*id.* at 107a) — a "middle ground" that did not accord the full protection of the corporate form to any but the most passive parent corporations.

The district court defined its "new, middle ground" in these terms: "a parent corporation is directly liable under section 107(a)(2) as an operator" whenever "it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." U.S. App. 107a. Applying that test to the facts of this case, the court found CPC liable because "the evidence shows active participation and control by CPC in Ott II affairs." *Id.* at 111a.[3]

The district court recognized that its decision was *ad hoc* and fact-bound: "In the final analysis, each case must be decided on its own unique facts and circumstances." U.S. App. 108a. The court rested its conclusion principally on the presence of CPC employees at the highest levels of Ott II — most notably, Ott and Eiszner, who continued to have close involvement with Ott II after they assumed responsibilities at CPC. *Id.* at 70-71a, 111a. See MDNR Pet. 18. The court assumed that any officer or director of Ott II who also held a position at CPC performed his Ott II duties not as an agent of Ott II but as an agent of CPC. The court also noted that CPC had contributed cash to Ott II's expansion, had to approve large expenditures approved by Ott II's board, and on occasion had shared business and legal resources with Ott II (see U.S. App. 76a-77a) — although in the same breath the district court claimed that "monitoring of a subsidiary's financial perfor-

[3] In light of this conclusion, the district court did "not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing" (U.S. App. 112a).

mance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research" were *not* activities that supported liability. *Id.* at 108a.

The district court focused on the presence of persons with CPC ties in Ott II's upper management generally, rather than any CPC corporate involvement in operations or waste disposal at the Muskegon facility. U.S. App. 65a-78a, 110a-112a. The court also identified three ways in which CPC "actively participated in Ott II environmental matters." U.S. App. 74a. First, the court attributed to CPC as an entity all discussions by the Ott II board and management of Ott II waste disposal, because some Ott II officers and directors also held positions with CPC. *Ibid.* Second, the court rested heavily on G.R.D. Williams's participation along with Ott II management in internal discussions and in meetings with outside persons involving Ott II environmental matters. *Id.* at 74a-76a. Finally, the court noted that a CPC attorney negotiated the use of a county wastewater treatment system for Ott II. *Id.* at 76a.

The district court also held that Aerojet was liable as an "operator" of the Muskegon facility. The court concluded that, "[a]s with CPC's involvement with Ott II, Aerojet's participation and control over * * * Cordova/California and Cordova/Michigan shows that the parent operated the facility." U.S. App. 124a. In addition, the court held that Aerojet was separately liable as the "present owner" of the facility, finding a basis under Michigan law to pierce Aerojet's corporate veil and charge the parent with the obligations of Cordova/Michigan, which owns the Muskegon site. See 42 U.S.C. § 9607(a)(1).

2. The Sixth Circuit, sitting *en banc*, reversed the judgments against CPC and Aerojet under Section 107(a)(2). U.S. App. 1a-24a. Contrary to the district court, the court of appeals did not believe that "operator" liability could be imposed on a parent corporation based solely on an *ad hoc* analysis of "the degree of control exerted by the parent over its subsidiary."

U.S. App. 18a. Certainly, "the degree to which [a parent] controls its subsidiary and the extent and manner of its involvement with the facility" could render a parent liable as an operator of a facility operated by its subsidiary. *Id.* at 15a. But the Sixth Circuit did not find anything in the statutory definition of "operator" — "any person * * * operating such facility" — or elsewhere in CERCLA that "warrants the invocation by courts of vague, expansive concepts, such as the district court's 'new, middle ground,' which threaten the efficacy of time-honored limited liability protections afforded by the corporate form." *Id.* at 13a-14a.

Accordingly, the Sixth Circuit held that a parent may be held liable under Section 107(a)(2) only (a) "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" or (b) "by piercing the corporate veil" under state law (U.S. App. 17a; see *id.* at 15a). Applying that standard, the court of appeals held that there was no support in the record for imposing "operator" liability on either CPC (*id.* at 16a-18a) or Aerojet (*id.* at 22a). With respect to CPC, the court of appeals noted that the factors on which the district court relied revealed only "a parent that took an active interest in the affairs of its subsidiary." *Id.* at 17a.

ARGUMENT

Petitioners invite this Court to embroil itself in an intensely fact-bound inquiry about what activities by a parent corporation render it liable under CERCLA as an "operator" of a hazardous waste facility owned and operated by the subsidiary corporation. All courts of appeals agree that there is a line over which a parent corporation may not cross without incurring liability as an "operator" of its subsidiary's facility. As the Sixth Circuit put it, "whether the parent will be liable as an operator depends upon * * * the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility." U.S. App. 15a. Each court of appeals ultimately sifts through the

totality of the circumstances to decide whether a parent company "operates" the facility that its subsidiary "operates."

The question presented here does not merit this Court's attention. This Court prudently has refrained from involving itself in the twists and turns of the lower courts' application of their fact-specific analyses, long tolerating the differences in phraseology between the First and Fifth Circuits. The United States acknowledges that the question of parent-subsidiary liability does not recur frequently. CERCLA issues generally are diminishing in importance as fewer covered sites are identified and as the 1980 enactment of CERCLA — which first warned companies, although not parent companies of legitimate subsidiaries, that they might be federally liable for all persistent hazardous waste — fades further into the past.

Moreover, the Sixth Circuit, like the Fifth Circuit years ago, correctly held that the word "operates" did not express congressional intent to override the existing well-settled law governing the liability of parent corporations for actions of their subsidiaries. In any event, CPC would not be liable even under a principled application of the "pervasive control" test for which petitioners seem to argue. Because further review by this Court is not warranted, the petitions should be denied.

I. WHETHER CPC "OPERATED" THE MUSKEGON FACILITY PRESENTS A FACT-BOUND ISSUE NOT WARRANTING REVIEW

A. The courts of appeals repeatedly have recognized that "an inherently fact-intensive inquiry * * * involving consideration of the totality of the circumstances presented" underlies every "determination whether a corporation has exerted sufficient control" of its subsidiary "to warrant imposition of operator liability." *Lansford-Coaldale Joint Water Authority* v. *Tonolli Corp.*, 4 F.3d 1209, 1222 (3d Cir. 1993); see also, *e.g.*, *Schiavone* v. *Pearce*, 79 F.3d 248, 255 (2d Cir. 1996). Not only is the placement of a specific set of intercorporate relations on a spectrum ranging from legitimate to excessive control neces-

sarily "fact-laden," *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993), but this case remains in an interlocutory posture. The Sixth Circuit remanded for further evaluation of the liability of Cordova/California and Cordova/ Michigan (see U.S. App. 22a-24a), which precludes the entry at this juncture of any "judgment adjudicating all the claims and the rights and liabilities of all the parties" (Fed. R. Civ. P. 54(b)).

It is important to bear in mind what questions are *not* presented here. This case does not involve the liability of individuals for waste disposal they personally performed or ordered performed while acting as officers of a company. Likewise, there is no dispute among the courts of appeals that operator liability attaches to a parent corporation that "directly operates [a] facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" (U.S. App. 17a), as could occur if the subsidiary were engaged in a similar business such that the parent could take advantage of the subsidiary's facility, or if the subsidiary owned real estate or other assets that the parent used in its business. Thus, MDNR flatly misrepresents the holding of the Sixth Circuit as precluding all "operator" liability on the part of a parent corporation at a facility owned and operated by a subsidiary unless "the requirements to pierce the corporate veil under state law are met." MDNR Pet. 6.

Upon examination, petitioners' chief complaint seems to be that the Sixth Circuit, unlike the district court, did not attribute all of Ott II's actions to CPC because the court of appeals did not implicitly assume that Ott II officers and directors who had ties to CPC acted as *CPC's* agents whenever they acted in their capacities within *Ott II*. But in assuming instead that Ott II officers and directors acted in their capacities within Ott II, rather than as infiltrators for CPC, the Sixth Circuit merely followed the well-established presumption that, unless the evidence shows that the individuals "favor[ed] the interests of one corporation while sacrificing or betraying those of the other," the individuals' acts taken in the course of managing the

subsidiary are by and for the benefit of the *subsidiary*, not instances of manipulation by the *parent* in disregard of the subsidiary's interest. *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 197 F.2d 994, 1000 (9th Cir. 1951) (emphasis deleted), order denying reh'g en banc vacated and remanded, 345 U.S. 247, reh'g denied on remand, 206 F.2d 495 (9th Cir.), cert. denied, 346 U.S. 910 (1953). See also, *e.g.*, *Pullman's Palace Car Co.* v. *Missouri Pacific Ry.*, 115 U.S. 587, 596 (1885); *Edwards Co.* v. *Monogram Industries, Inc.*, 730 F.2d 977, 985-986 (5th Cir. 1984) (en banc); *Fisser* v. *International Bank*, 282 F.2d 231, 238 (2d Cir. 1960); *Wiseman* v. *United Dairies*, 324 Mich. 473, 37 N.W.2d 174, 182 (1949).

Petitioners can point to nothing in CERCLA that purports to alter that rule of law. When petitioners' erroneous assumption is disregarded — an assumption that would effectively transform into acts of a parent all acts approved by directors or officers of a subsidiary who have fiduciary or employment duties to the parent-shareholder — the limited significance of the decision below fades still further.

B. Petitioners try to inflate the significance of this case by mischaracterizing the facts found by the district court, as well as the Sixth Circuit's response to those findings and their adequacy. For example, MDNR (Pet. 18) claims that "CPC was directly involved in the operation at the [Muskegon] facility"; the United States likewise asserts (Pet. 10) that the district court found that "CPC * * * had directly participated in the operation of the Muskegon site." But the district court's findings (even if they could have survived clear-error review) did not go so far, but rather concentrated on CPC's supposed participation in the upper management of Ott II rather than the operations at the Muskegon site.[4] MDNR claims (Pet. 18 n.4) that the district court "found that CPC did, in fact, control * * * waste disposal

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[4] In the court of appeals, CPC pointed out the lack of record support for many of the district court's findings. See generally CPC Opening C.A. Br. 5-38.

at the site"; the district court made no such finding, however, and the facts it did find would not have supported that conclusion. See U.S. App. 74a-76a.

The United States also claims (Pet. 17) that "the district found that [CPC] had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site." But the blanket citations the United States provides (see U.S. App. 67a-77a, 110a-112a) do not reflect any finding by the district court about CPC's motivation for allowing Ott and Eiszner to continue running what had been Ott's company, nor do the findings reflect anything reasonably resembling "close control" by CPC "over the day-to-day running of [Ott II]'s business at the Muskegon site."

Attempting to obscure the fact-specific character of the question presented here, the United States recites (Pet. 10-11) the district court's legal conclusions (under its "new, middle ground" standard) that CPC "actively participated in and exerted control over" various aspects of Ott II's business, while carefully eliding the flimsy underlying facts on which those conclusions were based. See pp. 2-7, *supra*. And MDNR asserts (Pet. 19) that the Sixth Circuit did not explicitly reject the district court's findings of fact as clearly erroneous.

But the dearth of factual support for the district court's broad conclusions did not escape the Sixth Circuit's notice. To the contrary, the court of appeals noted that "*[i]f anything*, the *facts* recited by the district court" might "support liability" under a theory of "exertion of power or influence through active participation in the subsidiary's business," but certainly could not support liability based on "actual operation of the subsidiary's business" — much less *operation of its facility*. U.S. App. 12a (emphasis added). As petitioners' factual quibbles make clear (*e.g.*, U.S. Pet. 20 n.6; MDNR Pet. 18-19 & n.4), the Sixth Circuit plainly and dispositively rejected as

factually unsupported the district court's findings on this and other issues. See, *e.g.*, U.S. App. 12a, 18a, 21a-22a, 24a.

C. In another attempt to broaden the significance of the question presented, MDNR asserts (Pet. 14) that the Sixth Circuit overlooked the strict liability that has been implied into CERCLA. But that argument puts the cart before the horse. As the United States acknowledges (Pet. 6), strict liability applies only after the plaintiff "has established the four elements of CERCLA liability." That a defendant is an operator or other responsible party is one of the "four basic elements" that must be proved *before* strict liability attaches. See *id.* at 5. The existence of strict liability does not displace the analysis for determining whether the preconditions for liability apply. As the Sixth Circuit recognized, that persons subject to a definition may be subject to strict liability does not provide a bootstrap justification for broadening the definition to cast "the widest net possible." U.S. App. 9a.

D. At bottom, the question presented by this case is whether the facts showed that two particular parent corporations, CPC and Aerojet, were sufficiently involved in the operation of the Muskegon facility by their subsidiaries to transform them into "operators" of the facility themselves. That issue does not merit the attention of this Court.

This case is of narrow significance for additional reasons. The United States (Pet. 26-27) concedes that it "does not routinely seek to hold parent corporations liable for conditions at a subsidiary's facility." And although the United States now asserts, for litigation purposes, that the conditions at the Muskegon site are "acutely hazardous," the government's inaction belies that claim. At trial, ten years after the Environmental Protection Agency "identified" what it calls "extraordinary public health risks" at the site (U.S. Pet. 9), EPA's sole

response was to engage in planning (U.S. App. 63a) rather than actually remediating those supposedly "acute[]" hazards."[5]

Now that CERCLA has been in place for 17 years, it is safe to assume that the great bulk of sites potentially within the scope of that statute have been identified and relevant litigation commenced, if not concluded. EPA has deleted three-quarters of the sites listed among those potentially requiring remediation, while the National Priorities List has been essentially stable for the past several years, with a handful of additions and deletions annually.[6] As additions to the Priorities List slow to a trickle — and may be legislatively capped before long — the limited importance of parent corporation liability for the operations of subsidiaries can only diminish further. See, *e.g.*, *Senate Legislation Would Make Major Changes In Liability, Site Cleanup*, SOLID WASTE REP., Aug. 21, 1997, at 259.

Finally, any decision by this Court in this case may well be mooted by congressional action. Congress has been considering legislation to restrict the scope of liability under CERCLA. See, *e.g.*, S. 8, 105th Cong., 1st Sess. (1997); H.R. 2727, 105th Cong., 1st Sess. (1997); H.R. 2750, 105th Cong., 1st Sess. (1997); H.R. 2485, 105th Cong., 1st Sess. (1997). See generally Johnson, Note, *Mr. Smith Goes To Washington: 1997 Superfund Amendments*, 31 NEW ENG. L. REV. 1269 (1997). The congressional leadership has made CERCLA reform "an

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[5] According to the EPA, legal disputes "have very little impact on the pace of cleanups." EPA, *The Facts Speak For Themselves: A Fundamentally Different Superfund Program* 9 (Nov. 1996).

[6] See, *e.g.*, *Superfund Reauthorization: Hearings Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Cong., 1st Sess. 454 (April 12, 1997) (Testimony of Steven A. Herman, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, and Timothy J. Fields, Jr., Acting Assistant Administrator, EPA Office of Solid Waste and Emergency Response); U.S. General Accounting Office, GAO/RCED-97-20, *Superfund: Times to Complete the Assessment and Cleanup of Hazardous Wastes* 8 (March 1997) (16 average annual NPL listings 1992-1996).

important priority," *GOP Agenda Includes Bill to Reform Hazardous Waste Cleanups*, DAILY ENV'T REP. (BNA), Jan. 22, 1997, at AA-1, and markup appears imminent for at least one bill. *Boehlert Schedules Markup Date for Bill Despite Differences with Democrats*, DAILY ENV'T REP. (BNA), Nov. 7, 1997, at A-2. Indeed, "[o]ne of the many issues to be tackled" is the standard for holding "shareholders — and parent corporations as controlling shareholders of their subsidiaries — liable as 'owners or operators' of the businesses in which they had an interest." NAT'L L.J., Sept. 22, 1997, at B4. The Senate leadership has conducted "more than 220 hours of discussion and negotiation," and both houses have held hearings on CERCLA reform. *Superfund Legislation: Hearings before the Sen. Environment and Public Works Comm.*, 105th Cong., 1st Sess. (Sept. 4, 1997) (statement of Sen. Chafee); *Boehlert, Browner Face Off at Hearing Over Small Party Definitions, Ground Water*, DAILY ENV'T REP. (BNA), Oct. 30, 1997, at A-5; see also n. 6, *supra*.

Whether CERCLA should alter prevailing state-law standards of parent-subsidiary liability is quintessentially a legislative policy judgment — and a judgment that this Court's precedents require Congress to make clearly if "pre-existing state law" is to be "displace[d]." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994). If the issues in this case are as important as petitioners assert, Congress may well enact clarifying amendments to Section 107 and other provisions, perhaps before this Court could hear this case, much less decide it. Such an exercise, particularly at this interlocutory stage, does not warrant the expenditure of this Court's scarce resources.

II. THE SIXTH CIRCUIT CORRECTLY DECLINED TO IMPROVISE A NEW FEDERAL STANDARD OF PARENT-SUBSIDIARY LIABILITY

A. This case not only presents no issues of sufficient general and recurring importance to warrant further review, but the Sixth Circuit correctly applied "traditional concepts of limited liability associated with the corporate form" to structure

its analysis. U.S. App. 12a. "Congress acts * * * against the background of the total *corpus juris* of the states." *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)). Limited liability through the use of the corporate form "is ingrained in our economic and legal systems." Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929).

There is no serious dispute that the statutory text of CERCLA does not "express any intention to hold parent corporations or other shareholders individually liable for corporate activities." Farmer, Note, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769, 780 (1994). Because Congress did not "speak directly to the question," unless a contrary legislative intent is "evident" statutes that, like CERCLA, "invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles" governing the corporate form. *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).

Thus, a "party contending that legislative action changed settled law" has the burden of proving "that the legislature intended such a change." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). Petitioners cannot carry that burden.[7]

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[7] The legislative history of CERCLA, although sparse on this point, indicates that Congress intended traditional common law principles to govern all interstitial issues of liability. Like the statute itself, the committee reports on CERCLA say nothing about parent-subsidiary liability or piercing the corporate veil. In their nearest approach to the subject, the sponsors of the legislation repeatedly expressed their intent that "issues of liability not resolved by [CERCLA]" should be governed by "traditional and evolving principles of common law." See, *e.g.*, 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph); *id.* at 31,965 (statement of Rep. Florio).

Unlike CERCLA, some federal statutes expressly provide that persons normally protected by the corporate veil may be subjected to statutory liability for the acts of their corporations. See, *e.g.*, Clayton Act, 15 U.S.C. § 24; Securities Exchange Act of 1934, 15 U.S.C. § 78p(b); Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; I.R.C. § 1239-(b)(2), (3); Fair Labor Standards Act, 29 U.S.C. § 203(r); ERISA, 29 U.S.C. § 1301(b). CERCLA's silence on this issue "is most eloquent" and should be dispositive evidence that Congress did not intend to work "an important and controversial change in existing law" by altering the treatment of the corporate form. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)

The plain meaning of CERCLA likewise supports the Sixth Circuit. Section 107(a)(2), which refers to "any person who * * * operated any facility" (42 U.S.C. § 9607(a)(2)), imposes liability on the persons directly responsible for the day-to-day operations *of the facility* that disposed of the hazardous waste. Yet petitioners' reading would transmute the unadorned word "operator" into "one who owns and oversees a legally separate operator." See *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 515-516 (1963) (favoring "normal and usual meaning" of statutory term over definition that would stretch simple phrase to cover complex two-stage process). By marshaling "all the facts regarding CPC's *involvement with Ott II*" (U.S. App. 110a (emphasis added)), and by holding CPC liable not for operating the Muskegon facility but for allegedly "operating" Ott II — a conclusion that itself was unsustainable — the district court rewrote CERCLA to impose liability upon a person simply for "operating" another legal person that operated a facility, producing the very sort of strained "two-stage" reading rejected in *Sun Oil*, 371 U.S at 514-516.

To the contrary, this Court long ago drew a clear distinction between operating a subsidiary's facility, in that case a railroad, and controlling the subsidiary company. After noting that the parent held virtually all the subsidiary's stock, and the

same individuals held similar positions as directors and management officials within the two companies, the Court nonetheless concluded that the separately incorporated subsidiary "operate[d] its own road." *Pullman's Palace Car Co.*, 115 U.S. at 589, 596. Although "[p]ractically [the parent] may control the [subsidiary] company, * * * the [subsidiary] alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs." *Id.* at 597.

B. Petitioners' contrary argument relies on a patchwork of assumptions and *non sequiturs*, rather than anything that Congress enacted, to override the governing legal principles. The centerpiece of petitioners' argument is that the imposition of liability on "operators" as well as on "owners," along with the unremarkable statutory acknowledgment that a "person" includes a "corporation," evidences congressional intent to do away with the preexisting protections of the corporate form.

As the United States' tour (Pet. 17) through dictionary definitions amply demonstrates, the common meaning of "operate" sheds no light on whether a parent corporation or other majority shareholder of a corporation that operates a facility is itself a second-level operator of the facility as well. Certainly, as the Sixth Circuit observed, "[if Congress wanted to extend liability to parent corporations" in a non-traditional way "it could have done so, and it remains free to do so." U.S. App. 14a (quoting *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991)). But what Congress did in many other statutes, see p. 17, *supra*, it did *not* do here.

The decision below in no way blurs the distinction between owner and operator liability. Petitioners apparently believe that the principal distinction between "owning" and "operating" a facility must lie in the methods by which parent corporations

may be held liable under each theory.[8] The distinction based on plain meaning is far simpler. One can be liable as an operator but not an owner by conducting operations at a site that one does not own. Lessees and landowners often are defendants together in CERCLA cases, though the owner conducted no operations and the lessee did not own the site. *E.g.*, *Joslyn Manufacturing Co.* v. *Koppers Co.*, 40 F.3d 750, 753 (5th Cir. 1994); *United States* v. *R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991). And a parent corporation could be directly liable as an operator at a facility owned by its subsidiary if, for example, the subsidiary existed only to hold title to real estate. Similarly, as noted above (at p. 10), a parent could "operate" a facility that was owned and also operated by its subsidiary.[9] That might have occurred here had the facts been different: for example, if CPC manufactured corn products at the Muskegon site (and disposed of the wastes) while Ott II made chemicals, or if CPC used the lagoons at Muskegon in order to dump wastes from CPC's own, off-site manufacturing processes. That CPC did none of these things does not mean that the legal definition of "operator" must nullify the corporate form.

Still more circular is the argument that, by including corporations among "persons" potentially liable as operators under CERCLA (see 42 U.S.C. § 9601(21)), Congress silently did away with the usual protections of the corporate form. If corporations were not included among "persons," even Ott II could not be liable as an operator. But the word "corporation"

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[8] MDNR (Pet. 11) objects that, "[u]nder the Sixth Circuit's decision, the standard for determining whether a parent corporation is liable as either an owner or operator would be the same: the facts must support piercing the corporate veil." But that is how American law determines the liability of a parent corporation for obligations of its subsidiary, whether the liability rests on what the subsidiary owned or on what the subsidiary did.

[9] In his seminal article, then-Professor Douglas noted that in this and the preceding example of a parent corporation's direct liability, "no question of vicarious liability [i]s involved" and thus the corporate veil does not need to be pierced. Douglas & Shanks, *supra*, 39 YALE L.J. at 209-210.

does not normally include a separate corporation that is the parent company of the first. Congress easily could have specified "parent corporation of a person" or "majority shareholder of a person" in the definition if it wanted to go beyond the usual scope of liability. It did not.

Finally, the Sixth Circuit was correct in refusing to rely on terms used in definitions adjacent to, but not included in, the relevant definition. The definition of "owner or operator" that applies to this case is purely circular: "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). The United States insists here (Pet. 18-19), as it did below, that parent liability should be governed by an *adjacent* definition, applicable only when a governmental authority has come into possession of an *abandoned* facility. In that instance, the statute imposes liability on "any person who * * * otherwise controlled activities" at the facility immediately before abandoning it. But "[a]s this Court has reiterated: 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates* v. *United States*, No. 96-7185, slip op. 5-6 (U.S. Nov. 4, 1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The Sixth Circuit understood "that the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." U.S. App. 13a.[10]

C. The *ad hoc* "operator" analysis that petitioners endorse is nothing more than a junior-varsity veil-piercing analysis,

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[10] The language of CERCLA also forecloses MDNR's argument (Pet. 10) that "participat[ing] in the management" of a subsidiary renders a parent corporation liable as an operator of the subsidiary's facility. A person who appears to be the legal owner of a facility, but who actually holds only a security interest in the property "without participating in the management of a * * * facility," is not subject to liability. 42 U.S.C. § 9601(20)(A). Thus, Congress restricted liability for merely "participating in the management of a * * * facility" to persons who, but for the operation of the security interest exception, plainly would be liable as owners. *Ibid.*

using the same or similar factors but substantially lowering the threshold for imposing liability. Whether the parent owns all of the stock of the subsidiary, whether there are common directors and officers, whether the parent uses the subsidiary's property, whether the parent exercises control over the subsidiary's business decisions, and whether the parent is involved in the subsidiary's financial affairs all regularly appear in veil-piercing analyses. See P. BLUMBERG, LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 1.02.1, at 16-17 (1983); S. PRESSER, PIERCING THE CORPORATE VEIL § 1.03[4] (1992).[11]

In fact, the principal factors on which the district court and petitioners would rely to make a parent the "operator" of its subsidiary's facility typify the parent-subsidiary relationship. By definition, a parent corporation controls its subsidiary. BLACK'S LAW DICTIONARY 1428 (6th ed. 1990). See 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 120.05[2] (1993). Thus, almost all parents "participat[e] in the subsidiary's board of directors [and] management" and are involved in "specific policy matters" such as finances. Compare U.S. App. 107a with *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 759 (7th Cir. 1989), and *Maki* v. *Copper Range Co.*, 121 Mich. App. 518, 328 N.W.2d 430, 433 (1982); see also H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 148, at 355 (3d ed. 1983) ("normal" for parent and subsidiary to have "identical directors and officers"); *Maki*, 328 N.W.2d at 432 (parent-subsidiary relation "by definition" includes, *e.g.*, disbursements by parent for subsidiary).

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[11] It should come as no surprise that the factors relied on by the district court in this case (see U.S. App. 66a-78a, 110a-112a) pertain to veil-piercing: one of the first courts to recast a watered-down veil-piercing analysis in terms of "direct" operator liability used the same factors to impose "direct" operator liability as for piercing the corporate veil. See *United States* v. *Kayser-Roth Corp.*, 724 F. Supp. 15, 22, 24 (D. R.I. 1989), aff'd, 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991). See U.S. App. 103a-108a (heavily relying on *Kayser-Roth*).

Because ownership of a subsidiary's stock, and the presence of common officers and directors, are "features that are common in most or all parent-subsidiary relationships," they "have been uniformly dismissed as inconsequential in and of themselves." BLUMBERG, *supra* § 1.02.1, at 17-18. In fact, the ultimate question in the district court's analysis, "the parent's exercise of control[,] * * * occurs in every parent-subsidiary relationship." *Id.* at 18. The other factors amount to mere oversight functions and the occasional provision of expertise in specific areas. See *Johnson* v. *Flowers Industries, Inc.*, 814 F.2d 978, 982 (4th Cir. 1987) (role of parent company's regional representative "to ensure that [subsidiary] implements the policy of the parent company" is "characteristic of a parent-subsidiary relationship"); *Maki*, 328 N.W.2d at 433 (refusing to assign significance to likelihood that "parent may monitor the subsidiary's fiscal activities and dealings").

One thing is clear: none of this has anything to do with the statutory standard of whether the parent corporation is actually *operating* its subsidiary's *facility*.

D. Petitioners' invocation of the rule that corporations are liable for the torts of their agents produces another circularity. The individuals through whom petitioners sought to hold CPC liable for Ott II's operations were agents of CPC only if, contrary to well-established precedent (see pp. 10-11, *supra*), dual officers and directors are assumed to be agents of the parent even when they act in their capacities with the subsidiary, or if the corporate separateness of the subsidiary can be assumed away. But petitioners can point to nothing in CERCLA that reflects Congress' intent to override either of those familiar common-law principles. Their argument simply begins from a conclusion and works backward.

* * * * *

"Private parties have relied on state corporation law when making corporate acquisitions and in forming and dissolving corporations." *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring). The Sixth Circuit properly concluded that the "disrupt[ion of] commercial relationships predicated on state law" is unwarranted where there is no sign that Congress intended to work that result in CERCLA. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979). There is no reason for this Court to a review a decision so squarely in line with governing principles.

III. CPC IS NOT LIABLE AS AN "OPERATOR" OF THE OTT SITE UNDER THE LIABILITY STANDARD SUPPORTED BY PETITIONERS

The petition should be denied for the additional reason that, under any reasonable standard of liability, the result would be the same.[12] Indeed, if the United States truly means to advocate a standard that would impose liability only on parent corporations that "actually participate[] in the *day-to-day operation of a subsidiary and its facility*" (Pet. 27-28; emphasis added), then no liability could attach to CPC, which was far removed from the "day-to-day operation" of Ott II, and still further removed from the actual operation of the Muskegon facility.

Petitioners claim that the holdings of the courts of appeals are "squarely conflicting." U.S. Pet. 28. The conflict is neither as direct nor as deep as petitioners suggest. Only the cases cited from the First Circuit (U.S. Pet. 23) actually imposed liability on parent companies. The Second, Third, Fourth, and Eleventh Circuits have yet to impose "operator" liability on a parent corporation, although the Third Circuit held that the federal government "operated" a plant it commandeered during World

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[12] Like petitioners, we place to one side the outlier decision in *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), cert. denied, 506 U.S. 940 (1992), which suggested (in *declining* to impose liability) that "direct" liability might attach to all majority stockholders of "operators." Although petitioners cannot bring themselves to defend that bizarre conclusion, it is the logical outgrowth of their rejection of traditional veil-piercing principles.

War II, where the government "determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold" — none of which CPC did in Muskegon. *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc). There is less to the supposed "conflict" than meets the eye.

Moreover, as commentators have observed, although courts may vary in their formulations, "the liability of a parent corporation is the same regardless of whether liability is premised on traditional corporate law," as in the Fifth Circuit's 1990 *Joslyn* decision and the decision below, or on "direct statutory liability under CERCLA," as in *United States* v. *Kayser-Roth*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 490 U.S. 1084 (1991), based on a perception that Congress modified traditional corporate law by using the word "operator." Oswald & Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 315 (1992). This case illustrates the point.

A. Aside from the United States' hint noted above, petitioners do not articulate the precise standard of parent corporation "operator" liability that they urge this Court to adopt. The United States cites (Pet. 22) four decisions from other circuits that "essentially agree with the standard that the United States urges"; MDNR appears to support a similar standard. See *Kayser-Roth*, 910 F.2d 24; *Schiavone*, 79 F.3d 248; *Lansford-Coaldale*, 4 F.3d 1209; *Jacksonville Electric Authority* v. *Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993). But several of the cited cases themselves sidestep a definition of the governing standard. The First Circuit in *Kayser-Roth* candidly acknowledged that its decision did not decide "the exact standard necessary for a parent to be an operator." 910 F.2d at 27. Similarly, in *Schiavone*, the Second Circuit noted that it, too, had not endorsed any standard of parent corporation liability and "decline[d] to do so." 79 F.3d at 254 n.5; see also *Certain Underwriters at Lloyd's* v. *St. Joe Minerals Corp.*, 90

F.3d 671, 674 (2d Cir. 1996) (again declining to identify standard).

To a substantial degree, therefore, the decisions upon which petitioners rely are self-consciously fact-bound. Indeed, in the Second Circuit's view, the determination "whether there exists control sufficient for the imposition of operator liability" requires "an inherently fact-intensive inquiry." *Schiavone*, 79 F.3d at 255. The Third Circuit agrees that the inquiry is "inherently fact-sensitive" and requires "consideration of the totality of the circumstances presented." *Lansford-Coaldale*, 4 F.3d at 1222.

To the extent that these cases express a rule of law, it is that a parent corporation will be held liable as an "operator" of a facility operated by its subsidiary if the parent exercises "pervasive control" over the subsidiary. *E.g.*, *Kayser-Roth*, 910 F.2d at 27. See U.S. Pet. 23. The First Circuit in *Kayser-Roth* affirmed the imposition of "operator" liability on a parent that had exercised "total influence and control" and "pervasive control" over its subsidiary. 910 F.2d at 27 (quoting district court decision). (Indeed, the First Circuit had no need to go beyond veil-piercing, as the district court had also pierced the corporate veil. See 724 F. Supp. at 24.) Likewise, in *Jacksonville Electric*, the Eleventh Circuit suggested that a parent corporation would be liable for the operations of its subsidiary only if the parent "exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary." 996 F.2d at 1110 (quoting district court opinion). And the Third Circuit held in *Lansford-Coaldale* that a parent corporation could be liable as an "operator" for the operations of its subsidiary if the evidence "sufficiently demonstrate[d] pervasive control." 4 F.3d at 1222 n.13.

2. Although the district court broadly *concluded* that CPC "controlled" Ott II, the *facts* found by the district court make clear that CPC did not exercise "pervasive control" over operations at the Muskegon facility. The district court did not

even find that CPC exercised "pervasive control" over Ott II (much less its waste disposal "facility").

In fact, CPC would not be deemed a CERCLA "operator" of the Muskegon facility under any reasoned application of the standard that petitioners advance. Ott II's overall policies were established by *its* board of directors, which "was an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner," and was "[f]ar more than a rubber stamp for management." U.S. App. 67a. Day-to-day operations at the Muskegon site were conducted by Ott II managers, *not* by CPC: "Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC"; "Ott II management formulated and implemented the company's day-to-day operating policies, including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing and environmental matters." *Id.* at 69a. Compare *Kayser-Roth*, 910 F.2d at 27.

The district court also found that Ott II operated essentially as Ott I had operated. Using the same personnel and the same officers as Ott I, Ott II manufactured the same products as Ott I and sold those products to Ott I customers under the same Ott nameplate. U.S. App. 66a. These findings belie the district court's ultimate legal conclusion that somehow CPC took over operations at Ott II's Muskegon site.

Indeed, the district court never even squarely addressed whether CPC actually operated the Muskegon *facility* (as opposed to "operating" the overall business of Ott II, which among other things included the sale of chemicals as well as their manufacture at the Muskegon and Charlotte plants). But, as noted above, CERCLA does not impose liability on persons that operate *other persons*; a person is liable only for operating a *facility*, that is, the building, ditch, or other area where hazardous waste has been deposited. See 42 U.S.C. § 9601(9);

Nurad, Inc. v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842-843 (4th Cir.), cert. denied, 506 U.S. 940 (1992). As the court of appeals correctly pointed out, the theory that CPC might be liable under Section 107(a)(2) because it actually conducted day-to-day operations at the Muskegon site was neither "relied upon by the district court" nor "supported by the facts in the record." U.S. App. 18a.

Instead, the district court relied on the mere presence of individuals with CPC affiliations serving in the management and on the board of Ott II to support "operator" liability:

> When a parent corporation permeates the board, management and decision making of a wholly owned subsidiary that was disposing of hazardous waste, operator liability directly attaches under CERCLA.

U.S. App. 111a-112a. The other factors — CPC's ownership of 100% of Ott II's stock, its approval of large capital expenditures and review of budgets through CP Development, its assistance on a handful of occasions in labor negotiations and environmental matters, and its intermittent provision of a few other corporate services (U.S. App, 110a-111a) — plainly do not demonstrate "pervasive control" by CPC over day-to-day operations at the Muskegon site, much less control over the use of the "facility" at issue, *i.e.*, the lagoons and other areas where wastes were deposited.

As explained above (at pp. 2-4), the actual participation by persons having an affiliation with CPC in Ott II's management was extremely limited; the district court premised CPC's operator liability primarily on CPC's *leaving Ott I officers* (Eiszner and Ott) *in place* while assigning them separate duties for CPC. But if CPC can be held liable as an "operator" of Ott II's Muskegon facility based upon the acts of employees such as Ott and Eiszner, then any meaningful use of dual directors or officers would subject every parent corporation to CERCLA

liability for the operations of its subsidiary.[13] Because the use of officers and directors in dual capacities is a hallmark of the parent-subsidiary relationship, see HENN & ALEXANDER, *supra*, § 148 at 355, this factor is no evidence of the parent corporation's "control" over its subsidiary as urged in the petitions.

In any event, several of the cases on which petitioners rely have explicitly recognized that the mere presence of parent corporation employees in the management of a subsidiary or on its board is *not* evidence of "pervasive control" by the parent. In *United States* v. *TIC Investment Corp.*, 68 F. 3d 1082 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996), the Eighth Circuit applied a "pervasive control" analysis in deciding not to hold dual parent companies liable as "arrangers" under CERCLA Section 107(a)(3) for disposal that their subsidiaries had "arranged." The Eighth Circuit found no significance in the participation by the parents' employees in the subsidiary's management and on its board of directors: the "mere fact that * * * individuals who were officers and directors for [the parents] concurrently served as officers and directors for [the subsidiary]" did not even "*tend* to establish" liability. *Id.* at 1092 (emphasis added).

In rejecting "operator" liability in another dual-parent setting, the Third Circuit held that majority representation on the subsidiary's board, along with representation in management, did not amount to "pervasive control" of the subsidiary. *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551 (3d Cir. 1997). The Third Circuit noted that there was no evidence that the parent corporations' representatives who served on the subsidiary's board or in its management "made any decision that was dictated by [the parents] or otherwise exhibited divided loyalty when attending to [the subsidiary's] business." 124 F.3d at 564. And the Eleventh Circuit in

[13] In this regard, the United States' self-serving and unsupported assertion (Pet. 26-27) that "many parent corporations do not engage in the type of active participation and control shown here" is particularly disingenuous.

Jacksonville Electric similarly held that the presence of trustees of the parent as directors and officers of the subsidiary did *not* indicate pervasive control, and affirmed a defense judgment. 996 F.2d at 1010-1011.

These decisions make clear that, even under a "pervasive control" analysis, participation by a parent in its subsidiary's business through representation by parent corporation employees in management and on the subsidiary's board amounts to appropriate parental oversight and does *not* form a basis for the imposition of "operator" liability. And as the Sixth Circuit noted, nothing else in the record supports the district court's conclusion. U.S. App. 18a. Because review here could not change the ultimate result, this case would be a poor vehicle even if review of the Sixth Circuit's fact-intensive inquiry were otherwise warranted.

CONCLUSION

The petitions for a writ of certiorari in Nos. 97-296 and 97-454 should be denied.

Respectfully submitted.

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No. 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1997

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UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The United States is responding to the release of hazardous substances at a former chemical manufacturing plant near Muskegon, Michigan, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, which provides a mechanism for financing government cleanups and recovering those costs from responsible parties. In response to the government's cost recovery efforts, the Sixth Circuit has announced a rule that absolves parent corporations of liability, even though they participated in the operation of the facility and share responsibility for the conditions at the site. As we explain in our petition, the court of appeals' decision warrants review because it is erroneous, it conflicts with the decisions of other courts of appeals, and it presents an important issue of corporate liability under CERCLA. Respondents attempt to minimize the waywardness of the court of appeals' decision, the conflict among the circuits,

and the importance of the substantial issues presented. Those attempts fall short of the mark.

1. As our petition explains (Pet. 15-21), the Sixth Circuit's decision erroneously concludes that a corporation that actively participates in and exercises control over a subsidiary's operations cannot be held liable, on that basis, as an "operator" of the subsidiary's facility under Section 107(a)(2) of CERCLA, but will be held liable only if state law requirements for "piercing the corporate veil" are met. That legal standard adopted by the Sixth Circuit is contrary to the plain language of Section 107(a)(2), which imposes direct liability on any person, including a corporation, that "operated" a facility at the time of disposal of a hazardous substance, regardless of that person's ostensible ownership interest in the facility.

a. Respondents contend that this case involves only a fact-bound inquiry into what activities render a parent corporation liable as an operator under CERCLA. See CPC Br. in Opp. 8-13; Aerojet Br. in Opp. 6-11. That contention is at odds with the court of appeals' decision and the question presented in this case. The district court made extensive factual findings in support of its conclusion that CPC and Aerojet actively participated in and exercised control over the operations of their respective subsidiaries at the Muskegon site and, on that basis, held the parent corporations liable as operators under Section 107(a)(2). See Pet. 10-12. The court of appeals' decision does not reject the district court's factual findings, but instead rejects the Section 107 liability standard adopted by the district court, which subjects a corporation to direct liability based on its participation in and actual control over a subsidiary's operation of a facility.

To be sure, if the United States had no legal objection to the standard of operator liability adopted by the Sixth Circuit, then any disagreement we would have that the particular facts in this case do not meet such a standard

would not, without more, warrant further review in this Court. That is not the case here. Contrary to respondents' assertions, our challenge to the Sixth Circuit's decision is not based upon "a particular factual application of accepted legal principles." Aerojet Br. in Opp. 10. Rather, we seek review of the court of appeals' decision because it creates a federal standard of corporate liability under CERCLA that is wrong as a matter of law and that stands in square conflict with the decisions of four other courts of appeals.

b. As our petition explains (Pet. 22-26), four other courts of appeals have interpreted Section 107 to impose liability on corporations that actively participate in and exercise actual control over the operations of their subsidiaries. Rejecting that liability standard, the Sixth Circuit itself acknowledges the conflict. Pet. App. 13a-14a; see *id.* 34a-35a. Hence, Aerojet's assertion (Br. in Opp. 7-10) that there is complete unanimity among the courts of appeals on the question presented is simply wrong.

CPC does not dispute that such a conflict exists. Rather, in CPC's view, the conflict is not "direct" or "deep" enough to warrant resolution by this Court. CPC Br. in Opp. 23-24. We disagree. CPC acknowledges that the First, Third, and Eleventh Circuits, unlike the Sixth Circuit, have embraced a liability standard that holds a parent corporation liable as an operator if the parent corporation exercises "pervasive control" over a subsidiary that owns a facility. *Id.* at 23-25. That some of those circuits have yet to impose "operator" liability on a parent corporation, as observed by CPC, is simply beside the point. At bottom, the liability standard adopted by those three circuits, and that created by the Sixth Circuit, cannot both be correct.

CPC fares no better in its attempt to downplay the significance of the conflict by suggesting that this Court should decline to review the question whether a corpo-

rate or individual shareholder should be subjected to operator liability under CERCLA because the Court has done so previously. See CPC Br. in Opp. 1 & n.1, 9. On those earlier occasions, no circuit conflict existed. To be sure, in *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80 (1990), cert. denied, 498 U.S. 1108 (1991), the Fifth Circuit held that a parent corporation can be held liable only through a corporate veil-piercing standard. The issue in *Joslyn Manufacturing*, however, was whether to "impose direct liability on parent corporations for violations of their wholly-owned subsidiaries." *Id.* at 81. The Fifth Circuit did not address a theory of liability holding a parent corporation liable as an operator based on *its own actions*. Hence, as we previously explained to this Court, and as the First Circuit noted in *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1990), cert. denied, 498 U.S. 1084 (1991), the Fifth Circuit's decision does not create a conflict among the courts of appeals. See U.S. Br. in Opp. at 12-13, *Kayser-Roth Corp.* v. *United States* (No. 90-816). Respondent Aerojet agrees (Br. in Opp. 7 n.3) and, like the United States (Pet. 26), notes that the Fifth Circuit has since ruled that individual officers and employees may be held directly liable as operators under CERCLA based on their actual participation in the operation of a facility and that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), cert. denied, 502 U.S. 1004 (1991) (citation omitted). See Aerojet Br. in Opp. 11 n.6.

In fact, contrary to CPC's suggestion that the conflict is not ripe for resolution, the Sixth Circuit has recently decided a CERCLA case that deepens the conflict between the Sixth Circuit and other courts of appeals. In a divided en banc decision, *Donahey* v. *Bogle*, Nos. 92-1128

& 92-1151, 1997 WL 710017 (Nov. 17, 1997), the Sixth Circuit extended the standard for operator liability articulated in the decision at issue here to an individual shareholder of a corporation that owns a facility. Applying the same standard as for parent corporations, the court held that an individual shareholder is not liable as an operator under Section 107(a)(2) of CERCLA "unless circumstances justify piercing the corporate veil." 1997 WL 710017, at *5. The Sixth Circuit thereby expands the conflict among the courts of appeals to the analogous issue of whether individual shareholders may be held liable under CERCLA based on personal participation and actual control. See *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985). Cf. *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993). Sixth Circuit precedent has thus departed even further from the decisions of other courts of appeals with respect to the proper federal standard for operator liability under CERCLA.

c. Nor is there merit to CPC's contention that review by this Court is not warranted because the facts do not support holding CPC liable as an operator even under the standard urged by petitioner. See CPC Br. in Opp. 11-13, 23-29. As our petition explains (Pet. 10-11, 17), the district court set out extensive factual findings in support of its conclusion that CPC actively participated in and exercised control over its subsidiary's business at the Muskegon site and, by doing so, operated the facility in question. While the Sixth Circuit held that the district court had applied the wrong standard of liability, that factual record was left virtually undisturbed by the court of appeals. And, contrary to CPC's assertions, the factual support in this case does not turn on the "mere presence of individuals with CPC affiliations serving in the management and on the board" of its subsidiary. See CPC

Br. in Opp. 27-28. Rather, the evidence demonstrates that corporate officers and board members of CPC and Aerojet did not simply serve as board members and officers of the subsidiaries, but actively participated in and, on behalf of the parent corporations, exerted actual control over the subsidiaries' business, including the operation of the Muskegon facility.[1]

d Similarly unpersuasive is Aerojet's argument that the petition should be denied because resolution of the question presented would not change the ultimate result with respect to its liability. See Aerojet Br. in Opp. 11-16. Aerojet contends that it cannot be held liable under Section 107(a)(2) because no disposal of hazardous substances occurred at the site during its tenure and because it is entitled to the third-party defense under Section 107(b)(3) of CERCLA. Those issues, both of which were remanded to the district court by the Sixth Circuit for further evaluation and factual findings with respect to Aerojet's subsidiaries, are not related to the question presented in this case. Rejecting the Section 107(a)(2) standard advanced by the United States, the court of appeals has fully absolved Aerojet of liability as an operator of the Muskegon site under CERCLA. It is appropriate for this

[1] In a similar vein, CPC accuses the United States of "disingenuous[ly]" claiming that "many parent corporations do not engage in the type of active participation and control shown here." CPC Br. in Opp. 28 n.13. As noted above, the United States does not contend that the *mere presence* of a parent corporation's officers in the management of a subsidiary or on its board is sufficient evidence to establish operator liability. Rather, as the district court found in this case, evidence must exist to show that the corporate officers exercised substantial control over the operations and management of the subsidiary's activities in a way that establishes that those officers participated in the operation of the facility.

Court to consider the question of operator liability as applied to Aerojet, as well as CPC, at this time.[2]

e. CPC argues at length that the court of appeals' decision, which rejects the government's straightforward interpretation of Section 107(a)(2), is correct. See CPC Br. in Opp. 15-23. While there will be time enough to respond to CPC's contentions in a brief on the merits if this Court grants review, we note that CPC's argument is fundamentally flawed because it is based on an erroneous assumption that the statutory text of CERCLA does not express any intention to hold parent corporations or other shareholders directly liable for their activities. As our petition explains (Pet. 15-21), the plain language of Section 107(a)(2) indicates that Congress intended to impose liability on any entity operating a facility, subjecting parties to liability on the basis of their own actions rather than on the basis of their corporate form. The Sixth Circuit's decision erroneously establishes a judicially created exception to Section 107(a)(2)'s federal liability standard by importing state law standards for applying the equitable doctrine of piercing the corporate veil.

2. Nor is there force in respondents' contention that review is not warranted because this case is of "narrow significance." CPC Br. in Opp. 1, 9, 13-15; Aerojet Br. in Opp. 5-6. The court of appeals' interpretation of who constitutes an operator of a facility under Section 107

[2] Accordingly, there is also no merit to CPC's suggestion that review is unwarranted because this case is in an interlocutory posture. CPC Br. in Opp. 10, 15. While the Sixth Circuit directed the district court on remand to make further factual findings and reconsider issues pertaining to the liability of Aerojet's subsidiaries, those issues turn on a factual inquiry that is irrelevant to resolving the question presented by the petition (as the court of appeals' resolution of that question while ordering the remand plainly suggests). The decisions below provide a fully developed factual record for the Court to conduct an inquiry into the proper standard of operator liability under Section 107.

would significantly hamper the United States' efforts to effectuate Congress's mandate of responding to the public dangers posed by hazardous waste sites. Its decision creates an exception to Section 107, absolving parent corporations of liability for their active participation in and control over the operations at hazardous waste sites owned by their subsidiaries. In effect, the court's exception to the liability standard established by Congress in Section 107 creates a disincentive "for those in control of hazardous substances to prevent releases and thus protect the public from harm," S. Rep. No. 848, 96th Cong., 2d Sess. 14 (1980), diminishes the fairness of CERCLA's liability provisions, and shifts the burden of bearing cleanup costs from responsible parties to the innocent public, see Pet. 27-28.

a. Respondents attempt to minimize the significance of this case by noting that *additions* of sites to the National Priorities List (NPL) have decreased. CPC Br. in Opp. 14; Aerojet Br. in Opp. 5-6 n.2. The rate at which new sites are added to the NPL, however, does not reflect the level of activity of the CERCLA program or, more fundamentally, the importance of the issue presented by this case. First, the NPL currently includes more than 1,000 sites. 40 C.F.R. Pt. 300, App. B; see 62 Fed. Reg. 50,442, 50,445 (1997). Cost recovery litigation has not been completed or yet commenced for many sites.[3] Second, although the Environmental Protection Agency (EPA) has examined more than three-quarters of the sites that were placed in EPA's "CERCLIS" inventory of potential NPL sites, more than 10,000 sites

[3] The Environmental Protection Agency referred to the Department of Justice 47 cost recovery cases under Section 107 of CERCLA in fiscal year (FY) 1997, 54 cases in FY 1996, 30 cases in FY 1995, and 42 cases in FY 1994. Currently, the Justice Department has more than 250 cost recovery actions pending in federal district court.

still remain in that inventory.[4] Third, the government may undertake certain response actions at sites that are not even listed on the NPL, see, *e.g.*, 40 C.F.R. 300.415(b)(1), and seek cost recovery for those actions. CPC's contention that it is "safe to assume" that "relevant litigation [has] commenced, if not concluded," under CERCLA is without merit. CPC Br. in Opp. 14.

Furthermore, as we explain in our petition and response to the other petitions in this case, the total government expenditures for cleaning up the hazardous conditions left by the owners and operators of the Muskegon site alone will total many tens of millions of dollars. Pet. 27; U.S. Br. at 6, *Michigan Dep't of Envtl. Quality* v. *CPC Int'l, Inc.* (Nos. 97-296 & 97-464). The court of appeals' decision completely absolves CPC and Aerojet of liability. If that decision is left standing, the public will assume those costs because those corporations are the only responsible parties that can contribute meaningfully to the cleanup of the site. In addition, the United States could be required to forfeit its claims for total response costs exceeding $220 million against parent corporation defendants for several cleanups at other CERCLA sites located within the jurisdiction of the Sixth Circuit.

[4] See *Superfund Reauthorization: Hearings Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Cong., 1st Sess. 454 (Apr. 10, 1997). When EPA receives reports of releases or potential releases of hazardous substances at a site, the site is placed on "CERCLIS," the data base for sites to be evaluated for potential response actions and listing on the NPL. Since 1996, EPA has listed approximately 30 additional sites on the NPL, and there is a substantial universe of sites still awaiting assessment, inspection, and NPL listing decisions. See, *e.g.*, 62 Fed. Reg. 50,442 (1997); *id.* at 15,572; 61 Fed. Reg. 30,510 (1996). Some of those sites may eventually be the subject of CERCLA response actions and cost recovery actions.

b. Finally, CPC is mistaken in suggesting that review is unwarranted because CERCLA is currently before Congress for reconsideration and reauthorization. See CPC Br. in Opp. 14-15. As the Court explained in *Braxton* v. *United States*, 500 U.S. 344 (1991), the possibility that Congress may resolve a conflict among the courts of appeals on a question of statutory interpretation is not generally a basis for this Court to refrain from considering the question. On the contrary, the Court ordinarily regards the task of resolving those conflicts "as initially and primarily ours." *Id.* at 348.[5] Accordingly, we believe that it would be appropriate for the Court to consider the question at this time.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1997

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[5] Indeed, CPC can only speculate that Congress's reconsideration of CERCLA will resolve the specific problem at hand. Congress may reauthorize CERCLA without any amendment addressing the question presented by this petition. We are not aware of any bill pending before Congress at this time that would resolve that question.

(5) (7) (5)

Nos. 97-296, 97-454 and 97-464

Supreme Court, U.S.
FILED
DEC 10 1997
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA (#97-454) and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (# 97-296),
Petitioners
v.
CPC INTERNATIONAL, INC., et al.
Respondents
and
CPC INTERNATIONAL, INC. (# 97-464),
Cross-Petitioner
v.
AEROJET-GENERAL CORPORATION, et al.,
Respondents

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF OF AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY OPPOSING PETITIONS

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RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

SUPPLEMENTAL ARGUMENT

The United States, No. 97-454, seeks review of the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572 (6th Cir. 1997) (en banc). The Michigan Department of Environmental Quality ("MDEQ"), No. 97-296, seeks review of only the portion of that decision affecting respondent CPC International, Inc. ("CPC"). CPC opposes the petitions but has also filed a conditional cross-petition, No. 97-464, regarding the decision in favor of respondent Aerojet-General Corp. ("Aerojet"). Aerojet has filed a Brief in Opposition to the petitions.

Aerojet submits this Supplemental Brief under Rule 15.8 to address two matters arising after the filing of its Brief in Opposition. The first new matter is the *en banc* decision of the Sixth Circuit in *Donahey v. Bogle*, ___ F.3d ___, 1997 U.S. App. LEXIS 32146 (6th Cir. Nov. 17, 1997). The second is the United States' request that the MDEQ's petition in No. 97-296 and CPC's conditional cross-petition in No. 97-464 be held in abeyance pending the Court's disposition of the United States' petition in No. 97-454.

1. On November 17, 1997, the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, issued its opinion in the case of *Donahey v. Bogle, supra*. In *Donahey*, the Sixth Circuit again recognized the potential for both direct and derivative theories of operator liability under § 107(a)(2) of CERCLA. *Donahey* involved, among other things, the issue of the operator liability of a 100% stockholder of a polluting company. The Sixth Circuit found the veil-piercing analysis of *Cordova* equally applicable to *Donahey* and held that the 100% stockholder was on the facts of the case not liable as an operator for the cleanup of the property at issue. *Donahey*, 1997 U.S. App. LEXIS 32146, *15-

16. The Sixth Circuit in *Donahey* also noted that *Cordova* provided for § 107(a)(2) operator liability for parent corporations that "directly operate" a facility, but concluded that a scenario supporting such direct liability was not before the court in *Donahey*. *Id.* at *16 n.7. Thus, the Sixth Circuit has once again recognized both direct and derivative theories of operator lability, contrary to the claim of the United States. The only remaining issue is whether the Sixth Circuit properly applied the theories to the facts of both cases. This Court should not spend its time policing particular applications of settled legal theories.

2. The United States requests that the MDEQ's petition, No. 97-296, and CPC's conditional cross-petition, No. 97-464, be held in abeyance pending the Court's disposition of the United States' petition, No. 97-454, but the reason the United States gives for its request actually supports denial of all these petitions without delay. According to the United States, the MDEQ has a unique interest in the outcome of the case because the Michigan Court of Appeals has held that the MDEQ must reimburse Aerojet and its subsidiaries for any CERCLA liability they may incur at the site. As set forth in Aerojet's Brief in Opposition, *see* Aerojet Br. Opp. at 12, 16-17, the MDEQ's reimbursement obligation actually supports prompt denial of all petitions with regard to Aerojet, because taxpayers will bear the ultimate financial responsibility for any liability assigned to Aerojet and its subsidiaries — precisely the result the United States asserts that it seeks to avoid in filing its petition. Moreover, denial of the petitions with regard to Aerojet will still allow both the state and federal governments to obtain complete relief from CPC if they prevail on the merits. Accordingly, while Aerojet agrees that the MDEQ has a unique interest in the outcome of this case, such

interest does not justify holding some of the petitions in abeyance and further prolonging this already protracted litigation.[1]

The United States' submission also discloses another basis to deny the petitions on claims against Aerojet without delay. The United States notes that settlement discussions with the MDEQ and Aerojet could ultimately lead to an agreement that would moot the claims against Aerojet and bar any future contribution actions under § 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).[2] This

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[1] Even though none of the governmental parties could possibly be prejudiced by prompt denial of the United States' petition and CPC's conditional cross-petition on the claims against Aerojet, CPC argues that its potential contribution claim against Aerojet may be compromised. But CPC's argument ultimately dissolves into nothing more than a desperate plea to this Court to save CPC from the natural consequences of its own voluntary decision to abandon contribution claims in this litigation. In its Reply Brief, CPC attempts to dodge this problem by blatantly mischaracterizing Aerojet's position with a selective quotation from Aerojet's Brief in Opposition. Contrary to CPC's characterization, Aerojet has never claimed that CPC abandoned its contribution claims for all time, and has never challenged CPC's statement that contribution claims have been reasserted in a *new* lawsuit still pending in district court (No. 1:94-CV-432 (W.D. Mich.)). Aerojet has stated only that CPC abandoned its contribution claim *in this litigation*, which is indisputably true. Whether CPC has reasserted a contribution claim in new litigation involving a different matrix of parties and claims has no bearing on whether this Court should choose to review issues *in this litigation* that have no practical impact on claims remaining *in this litigation*.

[2] Even if no new settlement is reached, the 1977 Stipulation and Consent Order with the State of Michigan was itself a resolution of liability to the State within the meaning of § 113(f)(2) that should bar both the State's claim against Aerojet and the contribution claim asserted by CPC. The district court rejected this contention. The parties briefed

Court should not devote its resources to a matter that the petitioning party acknowledges may settle before hearing.

CONCLUSION

The Petition for a Writ of Certiorari filed by the United States (No. 97-454) should be denied. Alternatively, even if the Court decides to grant this petition, it should do so only with respect to the claims against CPC. The Court should further deny the Conditional Cross-Petition of CPC (No. 97-464).[3]

December 8, 1997

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the issue on appeal, but the Sixth Circuit did not address it. CPC's potential contribution claim, which is no longer a part of this litigation and which is not viable in any event under § 113(f)(2), does not provide a sufficient justification for granting certiorari on the claims against Aerojet.

[3] No relief is sought against Aerojet or its subsidiaries in the Petition of the MDEQ (No. 97-296).

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No. 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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69 pp

QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the federal government to respond to public dangers resulting from the disposal of hazardous substances. Section 107(a)(2) of CERCLA provides that any corporation that "owned or operated any facility at which such hazardous substances were disposed of" shall be liable to the United States for the government's response costs at the facility. 42 U.S.C. 9607(a)(2). The question presented is:

Whether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's facility.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents are CPC International, Inc., Aerojet-General Corporation, Cordova Chemical Company, Cordova Chemical Company of Michigan, and the Michigan Department of Environmental Quality (formerly the Michigan Department of Natural Resources).

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-454

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-54a) is reported at 113 F.3d 572. The opinion of the district court (Pet. App. 55a-129a) is reported at 777 F. Supp. 549. The initial opinion of the court of appeals (Pet. App. 130a-170a) is reported at 59 F.3d 584. The court of appeals' order granting rehearing (Pet. App. 171a-172a) is reported at 67 F.3d 586.

JURISDICTION

The court of appeals entered its initial decision on July 14, 1995. The court of appeals granted a petition for rehearing and suggestion for rehearing en banc on October 19, 1995, and it entered its en banc decision on May 13, 1997. On August 4, 1997, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 10, 1997. The petition was filed on that

date and was granted on December 12, 1997 (118 S. Ct. 621). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Sections 101 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, are set out in the appendix to this brief. See App., *infra*, 1a-9a.

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public from the release of hazardous substances and to recover the government's expenses from the responsible parties. The United States brought this CERCLA action against CPC International, Inc. (CPC), Aerojet-General Corporation (Aerojet), and other parties to recover the government's costs of responding to a release of hazardous substances at a former chemical manufacturing plant near Muskegon, Michigan. The United States District Court for the Western District of Michigan ruled, *inter alia*, that CPC and Aerojet are liable for the federal government's response costs, specifically finding the two corporations liable as operators of the facility. A divided panel of the court of appeals reversed the district court's decision as to CPC and Aerojet. On rehearing en banc, a divided court of appeals reached the same result and reversed the district court's determination that CPC and Aerojet are liable as operators.

1. "CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Congress enacted CERCLA in 1980, in response to the serious public health threats posed by abandoned or

inactive waste disposal facilities. See, *e.g.*, H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17-22 (1980). Committee reports describing those threats concluded that existing federal laws prospectively regulating hazardous waste disposal were "clearly inadequate to deal with this massive problem" and that special legislation was needed to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with [those] sites." *Id.* at 17-18, 22.[1]

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[1] The enactment of CERCLA has its roots in the history of federal legislation, beginning more than 30 years ago, addressing the problems associated with solid waste disposal. Congress initially used its taxing and spending authority to fund research and provide assistance to the States in dealing with a growing volume of waste materials. See Solid Waste Disposal Act, Pub. L. No. 89-272, Tit. II, 79 Stat. 997. Congress gradually recognized, however, that the interstate nature of the problem called for a national waste disposal policy. See S. Rep. No. 988, 94th Cong., 2d Sess. 5-6 (1976). In the Resource Recovery Act of 1970, Congress provided for the development of "recommended" waste disposal guidelines; that statute also authorized a "national disposal sites study" for hazardous wastes. Pub. L. No. 91-512, 84 Stat. 1227, 1232, 1233.

Six years later, Congress concluded that the nationwide dangers posed by the treatment, storage, and disposal of hazardous waste required a national regulatory program. Congress accordingly enacted the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795. This statute revamped the Solid Waste Disposal Act to provide, among other things, a nationwide cradle-to-grave system for regulating the transportation, treatment, storage, and disposal of hazardous wastes. See 42 U.S.C. 6921-6939b. Congress came to recognize, however, that the prospective permitting provisions of RCRA could not cure the problems associated with decades of unregulated disposal of hazardous waste. Four years later, Congress enacted CERCLA specifically to deal with the problem of waste disposal sites that were not likely to be addressed by RCRA's regulatory program. The legislative history of CERCLA shows that Congress intended to provide a comprehensive solution to the problem of harmful effects of past, present, and future disposal practices, thus completing the regulatory program begun with the enactment of RCRA.

CERCLA establishes a basic framework for government action in response to releases and threatened releases of hazardous substances. Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604.[2] Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue orders and to seek injunctive relief to compel persons to respond to releases or threats of release. 42 U.S.C. 9606.[3]

CERCLA also provides a mechanism for financing government-initiated cleanups of hazardous waste sites. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. Congress was aware when it enacted CERCLA, however, that the costs of government response actions would likely greatly exceed the Superfund. See S. Rep. No. 848, 96th Cong., 2d Sess. 17-18 (1980); H.R. Rep. No. 1016, *supra*, at 20. Congress therefore established a liability scheme to enable the government to recover its response costs and to ensure "that those responsible for

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[2] CERCLA distinguishes between "removal" actions, § 101(23), 42 U.S.C. 9601(23), and "remedial" actions, § 101(24), 42 U.S.C. 9601(24), which are each considered a form of "response," § 101(25), 42 U.S.C. 9601(25). The NCP sets forth the EPA regulations governing the selection and implementation of response actions. See 40 C.F.R. Pt. 300.

[3] The President has delegated most of his authority for administering CERCLA to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 12,580, 3 C.F.R. 193 (1988 comp.), *reprinted in* 42 U.S.C. 9615 note.

any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. No. 848, *supra*, at 13; H.R. Rep. No. 1016, *supra*, at 17. Accordingly, the United States may bring judicial actions against responsible parties under Section 107 of CERCLA to recover the government's response costs and replenish the Superfund. CERCLA § 107(a)(A), 42 U.S.C. 9607(a)(A). Section 107 allows parties other than the federal government to recover necessary costs of response in certain circumstances and, in and conjunction with Section 113, allows liable parties to seek contribution from other liable parties. See CERCLA §§ 107(a)(B), 113(f)(1), 42 U.S.C. 9607(a)(B), 9613(f)(1).

The United States is entitled to cost recovery under Section 107 if it establishes four basic elements that, Congress has determined, justify the imposition of liability. The United States must show that: (1) there has been a "release" or "threatened release" of "hazardous substances" from a site; (2) the site is a "facility"; (3) the release or threatened release has caused the United States to incur "response costs"; and (4) the defendant is a party who, under the standards that Congress has set out in CERCLA, is responsible for the government's incurring of those costs. CERCLA § 107(a), 42 U.S.C. 9607(a); see, *e.g.*, *B.F. Goodrich Co.* v. *Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1378-1379 (8th Cir. 1989).

Section 107(a) specifically identifies four categories of parties who are potentially liable for the government's response costs. They are: (1) owners and operators of a facility at which there is a release or threatened release of a hazardous substance; (2) persons who owned or operated the facility at the time of a hazardous substance disposal; (3) persons who arranged for disposal or treatment of a hazardous substance at the facility; and (4) persons who selected the site and transported hazardous substances to

the facility. CERCLA § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4).[4]

The courts have consistently ruled that, once the United States has established the four elements of CERCLA liability, the responsible party is strictly liable, without any additional showing of causation, for the government's response costs. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chem.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); see also S. Rep. No. 848, *supra*, at 13-14.[5] The courts have also consistently ruled that, if the harm from the release of hazardous substances is indivisible, the responsible parties are jointly and severally liable. *E.g.*, *Kayser-Roth*, 910 F.2d at 26; *R.W. Meyer, Inc.*, 889 F.2d at 1507; *Aceto Agric. Chem.*, 872 F.2d at 1377; *Monsanto*, 858 F.2d at 172. See S. Rep. No. 848, *supra*, at 13 ("To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in

[4] CERCLA provides definitions of a number of the relevant terms, including, "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal." See CERCLA § 101, 42 U.S.C. 9601 (Supp. II 1996).

[5] Section 101(32) of CERCLA, 42 U.S.C. 9601(32), provides that the terms "liable" and "liability" shall be construed to be the standard of liability of Section 311 of the Clean Water Act (CWA), 33 U.S.C. 1321. The standard under Section 311 of the CWA is one of strict liability. See, *e.g.*, *Monsanto Co.*, 858 F.2d at 167-168 n.11. Hence, CERCLA's reference to that standard manifests Congress's intent that responsible parties are strictly liable under CERCLA.

hazardous substances which cause such damage benefit with relative impunity.").[6]

Responsible parties who are found jointly and severally liable may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *R.W. Meyer, Inc.*, 889 F.2d at 1507; *Monsanto*, 858 F.2d at 173; see also H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. I, at 79 (1985). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

2. This case arises out of the United States' attempt to recover its costs of responding to acutely hazardous conditions at a former chemical manufacturing plant in Dalton Township, Michigan, known as the "Muskegon" site. A series of chemical companies extensively contaminated that site through operations from 1959 through 1986.

a. The Ott Chemical Company (Ott I), a publicly traded Michigan corporation, which was founded and managed by principal shareholder Arnold Ott, owned the Muskegon site from 1957 to 1965. Pet. App. 63a-64a. Ott I located its sole chemical manufacturing facility at that site, and it engaged in various activities that resulted in the disposal and release of hazardous substances. For example, Ott I discharged waste water containing hazardous substances into two unlined lagoons at one part of the site, it buried drums containing hazardous substances at another, it spilled hazardous substances in the process and loading

[6] CERCLA imposes liability subject to only three limited defenses set forth in Section 107(b), 42 U.S.C. 9607(b). Section 107(a) provides that these defenses are the only allowable ones, and courts have interpreted them narrowly in keeping with CERCLA's remedial purposes. See, *e.g.*, *B.F. Goodrich Co.*, 958 F.2d at 1198; *Monsanto Co.*, 858 F.2d at 170.

areas of the site, and it dumped hazardous substances in a wooded portion of the site. By 1964, test results showed that Ott I's disposal practices had contaminated the soil, surface water, and the groundwater flowing beneath the Muskegon site. *Id.* at 60a-62a.

b. In 1965, CPC (then known as the Corn Products Company) acquired Ott I by incorporating a new subsidiary that purchased Ott I's assets in exchange for CPC stock and assumed the name of Ott Chemical Company (Ott II). Pet. App. 59a, 65a-66a. CPC had acquired Ott I as an avenue through which CPC could enter into the chemical manufacturing business. *Id.* at 64; see also C.A. App. 1923, 1932. Arnold Ott became a vice-president and scientific director of CPC. Ott I changed its name to the Muskegon Chemical Company and shortly thereafter ceased to exist. Pet. App. 66a.

Under CPC's ownership, Ott II continued and expanded the chemical manufacturing activities and waste disposal activities at the Muskegon site. Pet. App. 66a-67a.[7] CPC actively participated in and routinely exerted control over Ott II's business, including environmental matters, through the direct involvement of Arnold Ott and other CPC officers in Ott II's policy decisions and day-to-day operations. *Id.* at 67a-77a. CPC continued those operations through 1972. *Id.* at 78a.[8]

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[7] CPC planned rapid growth for Ott II and, following its acquisition of Ott II, the operations at the site "significantly increased as CPC contributed millions of dollars to expansion efforts." Pet. App. 66a-67a. That increase in production, in turn, resulted in "substantially greater amounts of wastewater and chemical waste" being disposed of in the unlined lagoons and elsewhere at the site. *Id.* at 67a.

[8] From 1965 to 1968, Ott II's sole business involved the operations at the Muskegon site. In late 1968, Arnold Ott and James Eiszner, both CPC officers at the time, made the decision to merge Ott II with Wica Chemical, Inc. (another wholly owned subsidiary of CPC) "into one company, which would become a division of Corn Products Company." See Trial Exh. 505 (Trial Tr. 12-14; C.A. App. 803); Eiszner Deposition Testimony, Vol. II (6/26/90) at 253 (Trial Tr. 12-14; C.A. App. 974). Thereafter, Ott II also included the chemical manufacturing plant in Charlotte, North Carolina, which was referred to as the "Charlotte" or "Wica" division. See, *e.g.*, C.A. App. 2329, 2334.

c. In 1972, CPC sold Ott II to Story Chemical Company (Story), a Georgia corporation. Pet. App. 59a, 78a. For six months following the sale, CPC "operated the Ott II business for Story." *Ibid.* Story continued Ott II's operations, but soon encountered financial problems. In 1976, it filed for bankruptcy protection. Story was adjudicated bankrupt in 1977, and title to the Muskegon site passed to the bankruptcy trustee. *Ibid.* The Michigan Department of Natural Resources (MDNR) recognized that the Muskegon site posed severe environmental hazards, and it became actively involved in efforts to attract a buyer for the site. *Id.* at 79a-81a.

d. In 1977, after extensive discussions with MDNR, Aerojet arranged to acquire the Muskegon site. Pet. App. 81a-83a, 92a. Aerojet created a wholly owned California subsidiary called Cordova Chemical Company (Cordova/California) that purchased the Muskegon site from the Story bankruptcy trustee. *Id.* at 82a-83a, 93a. In connection with that purchase, Cordova/California and MDNR entered into an agreement under which Cordova/California agreed to undertake certain cleanup actions, MDNR agreed to share in the funding of those actions, and MDNR agreed to indemnify Cordova/California for other expenses. *Id.* at 83a-91a.[9]

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[9] The Michigan state courts have held that, because of that agreement, MDNR must indemnify Aerojet and its Cordova subsidiaries against any CERCLA liability that they may incur at the Muskegon site. See *Cordova Chemical Co.* v. *MDNR*, 536 N.W.2d 860 (Ct. App. 1995), appeal denied, 554 N.W.2d 319 (Mich. 1996)(Table).

e. In 1978, shortly before commencement of chemical manufacturing activities at the site, Cordova/California created a wholly owned Michigan subsidiary, Cordova Chemical Company of Michigan (Cordova/Michigan), and transferred ownership of the Muskegon site to that company. Pet. App. 93a-94a. With the active participation of Aerojet, the Cordova companies conducted chemical production activities at the Muskegon site until 1986. *Id.* at 93a-100a.

f. In 1981, shortly after the enactment of CERCLA, the EPA identified the Muskegon site as posing serious public health risks. In 1982, the EPA placed the site on the NPL. See p. 4, *supra*; 40 C.F.R. Pt. 300, Apps. A and B (Table 1) (1996). Since that time, the EPA has incurred response costs in developing and implementing a comprehensive, multi-million dollar remedial plan to protect the public from harm. The final remedy will decontaminate the soil, surface water, and groundwater at the site. See Pet. App. 62a-63a.

3. The United States filed a cost recovery action under Section 107 of CERCLA naming five entities as responsible parties under Section 107 of CERCLA: (1) CPC; (2) Aerojet; (3) Cordova/California; (4) Cordova/Michigan; and (5) Arnold Ott. In anticipation of the United States' suit, CPC had already filed an action for contribution from Aerojet,Cordova/California,Cordova/Michigan,and MDNR. CPC also filed a third party complaint against its insurer. In turn, Aerojet and the Cordova subsidiaries filed contribution actions against CPC and the MDNR. The MDNR later filed a counterclaim against CPC and a cross-claim against Aerojet and the Cordova subsidiaries for cost recovery and contribution. The district court consolidated the actions and scheduled them for trial in three phases addressing, sequentially, the issues of liability, remedy, and insurance coverage. Pet. App. 56a n.1. On the eve of

the liability trial, Arnold Ott reached a settlement with the United States respecting his liability. *Id.* at 56a n.2.

The district court conducted a 15-day bench trial on the liability of the remaining parties. Those parties stipulated that there had been "releases" of "hazardous substances" from the Muskegon site, that the Muskegon site is a "facility," and that the United States had incurred reimbursable "response costs." See Pet. App. 63a. The trial accordingly focused on whether the non-settling entities had owned the facility, operated the facility, or arranged for disposal of wastes at the facility within the meaning of Section 107(a) of CERCLA. In resolving those issues, the district court specifically concluded that CPC and Aerojet are liable under Section 107(a)(2) of CERCLA on the ground that they had each directly participated in the operation of the Muskegon site during a relevant time period. *Id.* at 128a-129a; see *id.* at 65a-78a, 92a-100a, 110a-112a, 123a-125a.[10]

The district court concluded that "a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." Pet. App. 107a. The court found CPC and Aerojet liable under that standard. See *id.* at 110a-112a, 123a-125a.

The district court set out extensive factual findings in support of its conclusion. In relation to CPC, the court specifically found, for example, that:

> (1) "CPC actively participated in, and at times controlled, the policy making decisions of its subsidiary through its representation on the Ott II board of

[10] The district court made a number of other liability rulings. See Pet. App. 128a-129a. Those rulings are not relevant to the resolution of the question presented by this case.

directors," which "functioned as a major source of power and decision-making at the company" (Pet. App. 67a);

(2) "CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest levels of the subsidiary's management" (*id.* at 69a);

(3) "CPC's development company also actively participated in and exerted control over policy-making at Ott II in efforts to enhance performance, shape decisions, and affect personnel changes" (*id.* at 72a);

(4) "CPC actively participated in Ott II environmental matters" (*id.* at 74a);

(5) "CPC also exerted significant control over Ott II's finances," "actively participated in some Ott II labor matters," and "also participated in other aspects of Ott II's business" (*id.* at 76a, 77a).

The court determined that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters into the realm of an active operator." *Id.* at 111a.

The district court similarly found that Aerojet, like CPC, "operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan," and that "Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary." Pet. App. 124a. The court accordingly concluded that Aerojet, like CPC, is directly liable as an operator under Section 107(a)(2). *Id.* at 123a-125a.

The district court noted that, while CERCLA imposes direct liability on a corporation based on its own participation in the operation of a facility, a corporation may also be subject to vicarious liability for a subsidiary's actions through the application of equitable state-law principles that allow a court to disregard the separate corporate identities of a parent and its subsidiary "to prevent fraud, illegality, or injustice." Pet. App. 108a, 109a. The court found the evidence sufficient under that so-called "veil-piercing" theory to hold Aerojet vicariously liable as a present owner of the facility under Section 107(a)(1) of CERCLA. *Id.* at 119a-122a. The court, however, concluded that in light of its holding that Aerojet and CPC were directly liable under Section 107(a)(2) based on their own actions, there was no need to apply the state veil-piercing theory in that context. *Id.* at 112a, 124a-125a.

4. A divided panel of the Sixth Circuit reversed various aspects of the district court's decision, including its conclusion that CPC and Aerojet are liable as past operators of the Muskegon facility. See Pet. App. 130a-170a. The panel majority ruled, as a matter of law, that CPC and Aerojet cannot be held liable under CERCLA as operators of the Muskegon site unless the evidence provides a basis for disregarding their corporate form under state-law veil-piercing principles. *Id.* at 143a-144a. The court also held that, under Michigan state law, the corporate veil may be pierced only upon a finding of a fraudulent purpose. *Id.* at 144a.

5. The United States filed a petition for rehearing and suggestion for rehearing en banc on the question of whether CPC and Aerojet are directly liable as operators under Section 107(a)(2) of CERCLA. The court of appeals granted the petition and vacated the panel decision. Pet. App. 171a-172a. On rehearing en banc, a divided court of appeals reversed the district court's judgment with respect to the two parent corporations. *Id.* at 1a-54a.

In a 7 to 5 vote, the court of appeals rejected the legal theory, urged by the United States and relied upon by the district court, that a parent corporation may be held liable under CERCLA as an "operator" of a facility by virtue of the parent corporation's active participation in and exercise of control over the management and operations of a subsidiary that owns the facility. The court acknowledged that a parent corporation could "conceivably" be liable as an operator in some situations:

> At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary.

Pet. App. 12a. The court concluded, however, that "this is not a theory of operator liability relied upon by the district court, or alluded to in its opinion." *Ibid.*[11]

The court characterized the district court's decision as holding that "parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries." Pet. App. 13a. It specifically rejected that ruling, stating:

> [W]here a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met.

Id. at 15a. The court additionally stated that the federal government must satisfy the state law standards for piercing the corporate veil, which in Michigan would require a showing that "adherence to the fiction of separate corporate existence would sanction a fraud or promote an injustice." *Id.* at 16a. The court concluded that, under Michigan law, the facts in this case did not provide an adequate basis for piercing the corporate veil with respect to the two parent corporations involved in this case. *Id.* at 16a-18a, 21a-22a.[12]

Judge Ryan, joined by four other judges, dissented from the court's decision. Pet. App. 32a-54a. The dissenting judges criticized the majority for failing to adhere to the plain language of CERCLA's liability provisions. See *id.* at 32a-34a. They concluded that Section 107(a)(2) subjects a parent corporation to direct liability as an operator of a facility if the facts show that the parent corporation "actually operat[ed] a facility, regardless of the nature of the entity's ostensible interest in the facility." *Id.* at 34a. The dissenting judges noted that the majority's reasoning was particularly unpersuasive in the face of the numerous decisions of other courts of appeals, which supported the district court's conclusion that a parent corporation may be liable as an operator of a subsidiary's facility through its active participation in and control over the day-to-day management of the subsidiary's business. *Ibid.* at 34a-41a.[13]

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[11] The court's en banc decision is basically identical to the panel decision except for the statement that direct operator liability is "conceivabl[e]" under Section 107(a). Compare Pet. App. 11a-18a with *id.* at 140a-145a. The court made that statement in response to the dissent's criticism of its holding. See *id.* at 17a n.5.

[12] In addition, the court of appeals directed the district court on remand to make further findings regarding whether disposal of hazardous substances occurred while Aerojet and the Cordova companies owned the site and to revisit its conclusion that those companies had failed to prove their entitlement to a third party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3). See Pet. App. 22a-24a.

[13] The dissenting judges also criticized the majority's characterization of the district court's factual findings and its interpretation of Michigan law. Pet. App. 41a-50a. Judge Merritt, concurring in part and dissenting in part, filed a separate opinion stating that federal

Since issuing its decision in this case, the en banc court of appeals has also addressed whether a sole shareholder of a corporation may be held liable as an operator under CERCLA. *Donahey* v. *Bogle*, 129 F.3d 838 (1997). The en banc court extended its reasoning in this case to that situation and concluded that "a stockholder is not liable as an operator as defined by § 107(a)(2) of CERCLA unless circumstances justify piercing the corporate veil." *Id.* at 843. A petition for a writ of certiorari has been filed in that case. See *Donahey* v. *Livingstone*, petition for cert. pending, No. 97-1163 (filed Jan. 9, 1998).

SUMMARY OF ARGUMENT

The court of appeals misinterpreted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq*, an important federal statute governing the United States' authority to respond to the public dangers posed by the release of hazardous substances. In response to the government's cost recovery efforts, the court of appeals adopted a rule that absolves parent corporations of liability, even though they actively participated in the operation of a facility and share responsibility for the conditions at a hazardous waste site. The court of appeals' rule would erroneously engraft a judicially created exception onto Section 107(a)(2) by replacing the federal liability standard with state law standards that govern the equitable doctrine of piercing the corporate veil.

A. The court of appeals' ruling is contrary to the plain terms of the statute. Section 107(a)(2) of CERCLA establishes a federal liability standard that imposes direct liability on "any person," including a corporation, that "operates" a facility at the time of disposal of hazardous

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common law, and not state law, governs the standard for piercing the corporate veil. *Id.* at 24a-34a.

substances. In accordance with the ordinary meaning of Section 107(a)(2)'s terms, a corporation "operates" a facility if it actively participates in, and exercises control over, the running of the facility. Section 107(a)(2) and other relevant CERCLA provisions express Congress's intent to impose liability on any entity that operates a facility, irrespective of its corporate form. Accordingly, a parent corporation is directly liable as an operator under Section 107(a)(2) if it actively participates in, and exercises control over, the operations of a subsidiary's facility. That result is consistent with CERCLA's fundamental goal of imposing the costs of cleanup on those who are responsible for creating the hazardous situation.

B. Rejecting that straightforward reading of CERCLA, the court of appeals erroneously concluded that a parent corporation may be held liable under Section 107(a)(2) only when state law requirements for piercing the corporate veil are met. The court based its construction on a misreading of CERCLA's provisions dealing with abandoned facilities and, as a result, placed itself in conflict with the contrary rulings of the other courts of appeals that have considered the issue.

C. The court of appeals' decision to employ state law rules for "piercing the corporate veil" overlooks that CERCLA subjects entities to *direct liability*, without regard to corporate form, based on the entity's *own* actions in operating the facility. There is no need to consider state veil-piercing rules, which subject parent corporations to vicarious responsibility based on equitable considerations, when the parent corporation is directly liable based on its own actions. Congress is entitled to enact legislation that creates a federal liability standard that applies without regard to considerations of corporate form. The court of appeals' approach, which would impose additional conditions for liability drawn from state law rules that were developed in other contexts, would thwart the

fairness and efficiency of a federal program that Congress designed to address a national problem. By subjecting federal liability to the vagaries of state law veil-piercing rules, the court's decision would require extensive litigation over the content of state law rules, subject similarly situated parties to inconsistent results, and promote geographic inconsistency in a national program.

D. The district court correctly concluded that the express language of Section 107(a)(2) imposes liability on a parent corporation when it actively participates in, and exercises control over, the operations of the subsidiary's facility. Applying that standard, the district court properly concluded that CPC and Aerojet, during separate time periods, had each "operated" the Muskegon site. While the court of appeals held that the district court had applied the wrong standard of liability, it did not reject or cast doubt on those factual findings and, indeed, relied upon them. This Court should therefore reverse the judgment of the court of appeals with respect to the operator liability of CPC and Aerojet under Section 107(a)(2).

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 107(a)(2) OF CERCLA SUBJECTS CPC AND AEROJET TO LIABILITY AS OPERATORS OF THE MUSKEGON SITE

CERCLA creates a federal mechanism for addressing the problem posed by decades of improper disposal of toxic chemicals. Congress determined that the national scale of the hazardous waste disposal problem requires a comprehensive national solution. CERCLA accordingly authorizes the United States to undertake direct response actions throughout the country to protect the public from the release of hazardous substances, using federal funds earmarked for that purpose. See CERCLA § 104, 42 U.S.C. 9604. Congress also determined that the parties

responsible for creating hazardous conditions should pay for the cleanup of hazardous waste sites. CERCLA accordingly provides that the United States may recover its response costs from responsible parties according to a specific federal liability standard. See CERCLA § 107, 42 U.S.C. 9607.

Section 107 of CERCLA sets out the federal standard for liability. Section 107(a), in relevant part, states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> * * * * *
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of

shall be liable for the government's response costs. 42 U.S.C. 9607(a).

CERCLA defines the term "person" to include a broad range of entities, including corporations and other business organizations. CERCLA § 101(21), 42 U.S.C. 9601(21). Thus, CERCLA clearly envisions that a corporation may be liable as an operator of a facility. The issue in this case accordingly turns on whether CPC and Aerojet "operated" the Muskegon site, which is the facility in question in this case. See Pet. App. 63a; CERCLA § 101(9), 42 U.S.C. 9601(9). The district court correctly found CPC and Aerojet liable as operators. See Pet. App. 55a-129a.

A. CERCLA, By Its Plain Terms, Subjects A Parent Corporation That Actively Participated In, And Exercised Control Over, The Operation Of A Subsidiary's Facility To Direct Liability As An Operator Of The Facility

1. The ordinary meaning of "operate"

"The starting point in statutory interpretation is 'the language [of the statute] itself.'" *Ardestani* v. *INS.*, 502 U.S. 129, 135 (1991) (alteration in original) (quoting *United States* v. *James*, 478 U.S. 597, 604 (1986)). CERCLA defines the "owner or operator" of a facility to include "any person owning or operating such facility," CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A), but it does not specifically define the term "operate." Under settled principles of statutory construction, that term should be construed in accordance with its "ordinary and natural meaning." *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995); see *Walters* v. *Metropolitan Educ. Enter., Inc.*, 117 S. Ct. 660, 664 (1997); *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994); *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); see also *Edward Hines Lumber Co.* v. *Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988) (the statutory terms "owner or operator" in CERCLA should have "their ordinary meanings rather than unusual or technical meanings").

Ordinarily, to "operate" a facility means to "direct the working of" or "to manage" the facility. See, *e.g.*, *The Oxford English Dictionary* (2d ed. 1989) (defining "to operate" as "[t]o direct the working of; to manage, conduct, work (a railway, business, etc.)"); *The Random House Dictionary of the English Language* (2d ed. 1987) (defining "to operate" as "to put or keep (a factory, industrial system, ranch, etc.) working or in operation"); *Webster's Third New International Dictionary* (1967) (defining "to operate" as "to manage and put or keep in operation

whether with personal effort or not <*operated* a grocery store>"). Hence, under the ordinary meaning of the statutory terms, an entity (including a corporate entity) "operates" a facility if it actively participates in, and exercises control over, the running of the facility.

2. The statutory context

This Court has also stated that "'the meaning of statutory language, plain or not, depends on context.'" *Bailey*, 116 S. Ct. at 506 (quoting *Brown* v. *Gardner*, 513 U.S. 115, 117 (1994)); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Accordingly, this Court may consider not only the bare meaning of the word "operate" itself, but also its placement and purpose in the statutory scheme. See *Bailey*, 116 S. Ct. at 506. Reading the statutory language in context "leaves no room to doubt that Congress has singled out operators for liability, irrespective of their corporate form." Pet. App. 35a (Ryan, J., dissenting).

CERCLA imposes liability on any person who at the time of disposal of any hazardous substance "owned *or* operated" the facility. See CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2) (emphasis added). Section 107(a)(2)'s use of those terms in the disjunctive indicates Congress's intent to establish two distinct categories of liability for the environmental cleanup of a facility: Liability may be predicated on one's status as an owner of a facility *or* on one's actions in operating the facility. As the First Circuit has observed:

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability.

United States v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); see also *Schiavone* v. *Pearce*, 79 F.3d 248, 255 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209, 1221 n.11 (3d Cir. 1993). Section 107(a)(2)'s language and the pertinent statutory definitions indicate that "Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility." Pet. App. 34a (Ryan, J., dissenting).

The plain terms of the statute impose operator liability based on the actual conduct of responsible parties and not merely on their formal corporate relationship to the site. Furthermore, the liability extends to an entity that operated "*any* facility at which such hazardous substances were disposed of." CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2) (emphasis added). That language also indicates that Congress intended to impose liability on an actual operator without regard to whether a parent or its subsidiary owned the facility in question.

3. Related CERCLA provisions

The Court has further stated that, when construing a statute, it looks not only to "the language itself" and the "specific context in which [it] is used," but also to "the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). Related portions of the "owner or operator" definition in Section 101(20) of CERCLA are instructive in determining the meaning of the word "operate." See 42 U.S.C. 9601(20). When Congress enacted CERCLA in 1980, it defined the term "owner or operator" in Section 101(20) to exclude "a person who, without participating in the management of a * * * facility, holds indicia of ownership primarily to protect his security interest in the * * * facility." See Pub. L. No. 96-510, Tit. I, § 101(20)(A), 94 Stat. 2769. That so-

called "lender exemption" indicates that, while Congress was willing to create an exception from the liability scheme for lenders who, by virtue of a security interest, might qualify as "owners" under the ordinary meaning of that term, Congress was not willing to extend that exemption to lenders who, by "participating in the management" of the facility, fell within the ordinary meaning of an "operator." By the same reasoning, a stockholder or parent corporation that "participat[es] in the management" of a facility is potentially liable as an "operator."[14]

Congress's recent amendment of CERCLA supports that interpretation. In 1990, the Eleventh Circuit issued a decision that potentially narrowed the scope of the lender exemption, *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991). In response, EPA promulgated a regulation to clarify the scope of the protection that the exemption provided. See 57 Fed. Reg. 18,344 (1992). The District of Columbia Circuit invalidated the regulation on the ground that EPA lacked authority to adopt a regulation determining the scope of liability under CERCLA. See *Kelley* v. *EPA*, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110 (1995). Congress reacted to that decision by amending CERCLA to clarify the scope of the lender exemption, using substantially the same language and analysis that EPA had employed. See Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, Tit. II, § 2502(b), 110 Stat. 3009-464 (to be codified at 42 U.S.C. 9601(20)(E)-(F) (Supp. II 1996)). The amended

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[14] See *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) ("this exception implies that an owning stockholder who manages the corporation * * * is liable under CERCLA as an 'owner or operator'"); accord *United States* v. *Kayser-Roth Corp.*, 910 F.2d at 26 n.6; see also Pet. App. 33a (Ryan, J., dissenting).

version of Section 101(20) indicates, in accord with the original provisions of CERCLA, that Congress intended to impose liability on any entity that actually participated in, and exercised managerial or decisionmaking control over, a facility's operations.

Section 101(20), as amended, retains the original language of the lender exemption, but also specifies the range of protected activities that may be undertaken by lenders without incurring liability and the kind and degree of involvement that would result in CERCLA liability. See 42 U.S.C. 9601(20)(E), (F), and (G) (Supp. II 1996). Of particular relevance here, Section 101(20)(F) provides that a lender would be "considered to participate in management," and therefore would not be entitled to the exemption from the definition of "owner or operator," if it:

> (I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or
>
> (II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility —
>
> > (aa) for the overall management of the vessel or facility encompassing day-to-day decisionmaking with respect to environmental compliance; or
> >
> > (bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance.

42 U.S.C. 9601(20)(F)(ii)(I)-(II) (Supp. II 1996). The amendment later defines the term "operational function" to include "a function such as that of a facility or plant manager, operations manager, chief operating officer, or

chief executive officer." 42 U.S.C. 9601(20)(G)(v) (Supp. II 1996).

Section 101(20)(F) adopts the approach that EPA set out in the preamble to its rule. EPA concluded that the distinction between "owners or operators" and persons entitled to the lender exemption should depend on whether the person "actually exercises decisionmaking control over the facility's operations from within the facility's hierarchy." 57 Fed. Reg. at 18,359. Under that approach, a person "performing the functions of a plant manager, chief operating officer, or chief executive officer, and the like, is considered to be involved in the operational aspects of the enterprise" and, hence, within the definition of an "owner or operator" under CERCLA. *Id.* at 18,360. Section 101(20)(F) follows EPA's approach virtually verbatim and explicitly ratifies EPA's understanding of the types of "operational functions" that will result in operator liability under CERCLA.[15]

Congress's clarification of the lender liability exemption provides further evidence that Congress intended to impose "operator" liability on an entity—irrespective of its identity or corporate form—that actively participates in, and exercises managerial or decisionmaking control over, the operations of a facility. Congress's action indicates that the term "operate" in Section 107(a)(2) conveys its "ordinary or natural meaning." See *Bailey* v. *United States*, 116 S. Ct. 501, 507 (1995) (relying upon the amendment history of a statutory provision to cast light on Congress's intended meaning).

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[15] In addition, Congress's amendment of Section 101(20) makes clear, in accord with the United States' view (see note 17, *supra*), that the term "participate in management" means "actually participating" in the management or operations of the facility, not "merely having the capacity to influence, or the unexercised right to control" facility operations. 42 U.S.C. 9601(20)(F)(i).

4. *CERCLA's statutory objectives*

In interpreting a statute, the Court may also "look to the provisions of the whole law, and to its object and policy." *E.g.*, *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989); (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51-52 (1987)). The government's interpretation of the word "operate" to reach any entity that actually operated a facility is also consistent with CERCLA's specific objectives, most importantly, its goal of making "'those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created,'" *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982)), and creating a "compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm," S. Rep. No. 848, *supra*, at 14, 17-18.

B. The Court Of Appeals' Interpretation Of Section 107(a)(2) Is Incorrect And Departs From The Decisions Of Other Courts Of Appeals

1. *The court of appeals' mistaken reliance on Section 101(20)*

The court of appeals rejected the district court's sensible construction of Section 107(a)(2)'s plain terms. In doing so, the court engaged in a lengthy discussion of canons of construction and general principles of corporate liability, but it paid scant attention to the actual language of Section 107(a)(2). See Pet. App. 7a-12a. It provided no explanation why the term "operated" should not be given its "ordinary or natural meaning." Rather, the court's analysis of the statutory terms is limited to its brief discussion of CERCLA's definition of "owner or operator" as it relates to facilities that have been involuntarily conveyed to a state or local government. *Id.* at 13a; see CERCLA

§ 101(20), 42 U.S.C. 9601(20). The court's counter-intuitive conclusion—that Section 101(20)'s definition of the term "owner or operator" excludes persons who actually controlled the operation of a facility—rests on a fundamental misunderstanding of the definition.

Section 101(20) of CERCLA defines the term "owner or operator" with reference to the context in which the term is used. See 42 U.S.C. 9601(20). When Congress enacted the original version of CERCLA in 1980, Section 101(20)(A) provided in relevant part as follows:

> "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of an abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.

Pub. L. No. 96-510, Tit. I, § 101(20)(A), 94 Stat. 2769. As the text of that provision indicates, Congress saw a need to address a special problem posed by abandoned facilities. Congress recognized that such facilities were likely to be non-operational for some time prior to their abandonment, and it therefore made clear in Section 101(20)(A)(iii) that the term "owner or operator" includes persons who "otherwise controlled activities" at a non-operational site immediately before its abandonment.

When Congress amended CERCLA in 1986, it retained the original version of Section 101(20)(A)(i) and (ii), but it modified clause (iii) to address the question of state liability for abandoned facilities. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I, § 101(20)(A), 100 Stat. 1615. Congress provided that if a state or local government received "title or control" of a facility through an involuntary mechanism, such

as abandonment, the "owner or operator" would be the person "who owned, operated, or otherwise controlled activities at such facility immediately beforehand." 100 Stat. 1615. Recognizing that those facilities may be non-operational, Congress carried forward the "otherwise controlled" language of the original clause. See CERCLA § 101(20)(A)(iii), 42 U.S.C. 9601(20)(A)(iii).

The court of appeals inferred from Congress's use of the "otherwise controlled" language that "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." Pet. App. 13a. As the text of the original and amended provision shows, that is simply not the case. Congress retained the "otherwise controlled" language in clause (iii) to make clear that the term "owner or operator" includes persons who "controlled activities" at an inactive facility. That language provides no basis for the illogical conclusion that the term "owner or operator" excludes persons who controlled the operations of an active facility.[16]

2. The decisions of other courts of appeals

Because the court of appeals gave little heed to CERCLA's statutory language, its decision predictably departs from the views of the other courts of appeals that have encountered the question. See Pet. App. 13a. In the

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[16] The court of appeals' reasoning implausibly suggests that Congress intended the term "owner or operator" to include persons having operational control only if the facility has been abandoned. There is no indication in CERCLA's legislative history of any such intent. See Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 Case W. Reserve L. Rev. 65, 95-96 (1992). Moreover, given Congress's intent that those who are responsible for creating hazardous conditions, rather than the innocent public, bear the costs of cleanup, it would be incongruous to conclude that those who controlled activities at a facility should be liable only in those circumstances when a facility has been abandoned or conveyed through bankruptcy, foreclosure, or other similar means.

corporate shareholder context, four courts of appeals have squarely interpreted Section 107 to impose operator liability on parent corporations by virtue of their active participation in and exercise of actual control over the operations of their subsidiaries. See *United States* v. *Kayser-Roth Corp.*, *supra*; *Schiavone* v. *Pearce*, *supra*; *Lansford-Coaldale Joint Water Auth.*, *supra* at 1220-1225; *Jacksonville Elec. Auth.* v. *Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993). Those courts recognize that Section 107(a)(2) of CERCLA creates a federal liability standard that, by its plain terms, subjects corporations to direct liability based on their actual involvement in the operation of a subsidiary's facility.

The First Circuit in *Kayser-Roth* held that a parent corporation was directly liable under Section 107(a)(2) for the government's costs in responding to the release of hazardous substances at a subsidiary's facility. 910 F.2d at 26-28. The court determined from its "analysis of the statute and its legislative purpose and history" that a corporation may be found liable as an operator on account of its pervasive involvement in the subsidiary's operations. *Id.* at 26-27. The court noted that other courts have consistently construed the term "operator" to include corporate officers and shareholders who participate in the operation of a facility. *Ibid.* It concluded that a parent corporation that participates in the operation of a subsidiary's facility is similarly liable. *Id.* at 27. See also *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 407-408 (1st Cir. 1993).

The Second Circuit reached a similar result in *Schiavone*, which involved a private action over the effect of an indemnification agreement on CERCLA liability. 79 F.3d at 250-251. The court observed that a parent corporation may be charged with "operator liability" based on "the independent actions of the parent corporation, evidenced through its control over the polluting site." *Id.* at 254.

That reading of the statute is "both compatible with the statutory language and consistent with CERCLA's broad remedial scheme." See *id.* at 255. See also *Certain Underwriters at Lloyd's* v. *St. Joe Minerals*, 90 F.3d 671, 674 (2d Cir. 1996).

Similarly, the Third Circuit in *Lansford-Coaldale Joint Water Authority* concluded that a parent corporation could be held liable as an operator if "there is evidence of substantial control exercised by one corporation over the activities of the other." 4 F.3d at 1221. The court explicitly followed the test applied in *Kayser-Roth* and the district court decision in this case, stating that the "actual control" standard "hold[s] accountable for environmental violations those corporations which are not mere investors in other corporations, but instead have actively and substantially participated in the corporation's management." *Id.* at 1222. See also *Aluminum Co. of America* v. *Beazer East, Inc.*, 124 F.3d 551, 562-565 (3d Cir. 1997); *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).

Likewise, according to the Eleventh Circuit, "[t]he plain language of the statute leads to the conclusion that a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise." *Jacksonville Elec. Auth.*, 996 F.2d at 1110. Interpreting "the terms of the statute according to their ordinary meaning," the court concluded that a parent corporation is directly liable under Section 107(a)(2) if the parent "'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary.'" 996 F.2d at 1110 &

n.3.[17] (quoting *Jacksonville Elec. Auth.* v. *Eppinger & Russell Co.*, 776 F. Supp. 1542, 1547-1548 (M.D. Fla. 1991).

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[17] In addition to the decisions of those courts, the Eighth and Ninth Circuits have indicated in dicta that a parent corporation may be held liable as an operator based on its control over a subsidiary's facility. See *United States* v. *TIC Invest. Corp.*, 68 F.3d 1082, 1091 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996); *AT & T Co.* v. *Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 n.8, opinion supplemented on other grounds, 95 F.3d 1156 (9th Cir. 1996). The Seventh and Tenth Circuits have similarly resolved the analogous issue of whether individual corporate officers may be liable under CERCLA by applying a standard based on personal participation and actual control. See *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993).

The Fourth Circuit has adopted a more expansive standard of operator liability than that urged by the United States or relied upon by the district court in this case. That court has indicated in a private cost recovery action that the mere "authority to control the facility" is sufficient for establishing operator liability. *Nurad, Inc.* v. *William E. Hooper & Sons, Co.*, 966 F.2d 837, 842 (4th Cir.) (liability as applied to tenants at a site), cert. denied, 506 U.S. 940 (1992). The United States does not endorse liability based solely on the "authority to control," as is sometimes urged by private parties.

The Fifth Circuit is the only court of appeals that heretofore had employed the restrictive standard of parent liability that the court of appeals applied in this case. That court initially ruled in a private cost recovery action that a parent corporation's liability must be established through a corporate veil-piercing standard. *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991). The continuing vitality of that precedent, however, is open to question. That court has since ruled that individual officers and employees may be held directly liable as operators under CERCLA, when "they themselves actually participate in the wrongful conduct prohibited by the Act" and that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), cert. denied, 502 U.S. 1004 (1991) (quoting *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)).

C. There Is No Warrant For Distorting The Ordinary Meaning of CERCLA's Express Terms Through The Adoption Of State "Veil-Piercing" Rules

1. The distinction between federal liability standards and state veil-piercing rules

Section 107(a)(2) of CERCLA, by its plain terms, establishes a straightforward and sensible rule of operator liability: Any entity (including a parent corporation) that actively participated in, and exercised control over, the operation of a facility is liable, on that basis, as an "operator" of the facility. The court of appeals has erred by supplementing that statutory standard with an additional requirement drawn from state-law principles governing derivative liability. According to that court, a parent corporation is not liable as an operator of a subsidiary's facility—notwithstanding the parent's active participation in, and control over, the operation of the facility—unless there is a basis under state law for "piercing the corporate veil." Pet. App. 15a. The court of appeals' imposition of that extra-legislative requirement has effectively usurped Congress's legislative role and distorted the federal liability standard.[18]

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[18] The court reached that result based, in significant part, on its own notions of proper policy. Pet. App. 14a-15a. At the outset, we note that its policy analysis is itself flawed. First, it is far from clear that "the traditional doctrine of piercing the corporate veil" provides a "relatively bright line" standard. *Id.* at 14a; compare, *e.g.*, *id.* at 29a-31a (Merritt, J., dissenting in part) (describing the federal common law standard); *id.* at 45a-46a (Ryan, J., dissenting) (disputing the majority's interpretation of the Michigan standard). As legal scholars have long observed, the so-called "traditional" doctrine is enveloped in a "mist of metaphors" that has not produced clear or uniform rules. See, *e.g.*, William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193, 195 n.8, 218 (1929) (quoting Judge Cardozo's admonitions in *Berkey* v. *Third Avenue Ry. Co.*, 244 N.Y. 84 (1926)); see also note 27, *infra*. Second, it is highly unlikely that the court of appeals' liability standard—which would prevent the government from recovering response costs from those parties that are actually responsible for creating the public danger—would encourage "private sector participation in the cleanup of existing sites." Pet. App. 14a. The court's interpretation would be likely, instead, to thwart CERCLA's central purpose of creating "a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm." S. Rep. No. 848, *supra*, at 14, 17-18. Of course, even if the court's policy analysis were more persuasive, it is ultimately beside the point. The question of appropriate policy in this area is a matter for Congress, which has spoken to that issue through the liability standard that it has established.

The court of appeals erred first by misconceiving the relevance of a parent-subsidiary corporate structure to the standard of "operator" liability under Section 107(a)(2) and, consequently, by misapplying the equitable doctrine of "piercing the corporate veil." Under general principles of corporate identity, a corporation that owns a separately incorporated subsidiary is generally insulated, by virtue of the subsidiary's separate corporate form, from liability for the *subsidiary's* actions. See, *e.g.*, William O. Douglas & Carroll M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193 (1929). The parent corporation, however, is not insulated from liability for its *own* acts. See, *e.g.*, *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business.").[19]

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[19] See also, *e.g.*, 10 *Fletcher Cyclopedia on the Law of Private Corporations* § 4877, at 323 (rev. 1986) ("corporations * * * can commit almost any kind of a tort that individuals can commit, and are liable for the acts of their servants and agents * * *; that is now hornbook law, unless changed by statute"); Phillip I. Blumberg, *The Law of Corporate Groups, Problems of Parent and Subsidiary Corporations Under Statutory Law of General Application* 621 (1989) ("For acts within the scope of authority, the law also imposes liability on the corporation or principal under the doctrine of *respondeat superior*.").

In a situation like the one presented here, where the evidence shows that a parent corporation, through the use of its own agents acting on that parent corporation's behalf, actively participated in the operation of a subsidiary's facility, the parent corporation is directly liable as an operator under federal law. The liability results from the application of the federal standard to the parent corporation's own proven conduct. There is no need to invoke a state's equitable doctrine for "piercing the corporate veil" because that doctrine "simply does not speak to the appropriate analysis of *direct* operator liability" under a federal statute. Pet. App. 38a (Ryan, J., dissenting). See also *id.* at 35a-38a (Ryan, J., dissenting); *id.* at 112a, 124a-125a. Indeed, respondent Aerojet itself repeatedly conceded precisely that point before the court of appeals. Aerojet C.A. Br. as Appellee at 34; Aerojet C.A. Supp. Br. at 20 n.18.[20]

The court of appeals additionally erred in failing to recognize that direct liability and derivative liability denote two analytically distinct concepts and hence require two separate inquiries. See *Lansford-Coaldale*, 4 F.3d at 1220; *Schiavone*, 79 F.3d at 254-255. The court conflated and confused those concepts by holding, in effect, that a parent corporation cannot be held directly liable under Section 107(a)(2) unless that corporation would also be derivatively liable under state veil-piercing standards. As we have explained, the court's ruling (which it has since extended to individual stockholders, see p. 16, *supra*) has no basis in the text of the statute. See pp. 19-25, *supra*. The court's decision has created a new liability standard that misdirects the inquiry away from the central question under Section 107(a)(2) of CERCLA—whether the parent corporation actually "operated" the facility in question—and focuses instead, on variegated state law standards respecting "abuse of the corporate form" (Pet. App. at 15a).[21]

[20] Aerojet conceded that the "statutory term 'operator' and the concept of operator liability are not state law issues; rather, they are federal law issues that federal courts must apply in accordance with the statute." Aerojet C.A. Br. as Appellee at 34. Aerojet further explained that "[s]tate law does not and cannot illuminate the analysis," *ibid.*, and that accordingly, "a parent company can be an 'operator' within the meaning of federal law even in the absence of facts warranting disregard of the corporate form under state law." Aerojet C.A. Supp. Br. at 20 n.18; see also Aerojet C.A. Br. as Appellee at 28-35; Aerojet C.A. Br. as Appellant at 23-26.

2. The limited role of state veil-piercing rules as a supplement to the federal liability standard

Even looking beyond the deficiencies in the court of appeals' reasoning, there is no basis for erecting state veil-piercing rules to insulate a parent corporation from the plain terms of the federal liability standard. As an initial matter, Section 107 of CERCLA counsels against adopting additional requirements for liability beyond those that Congress has specified. Section 107 expressly states that the federal liability standard contained therein ap-

[21] The court of appeals does acknowledge that "at least conceivably" there may exist circumstances for which a parent corporation may be deemed an operator of a subsidiary-owned facility, i.e., "the parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary." Pet. App. 12a, 17a. That formulation, however, appears to restrict "direct liability" to those situations in which the parent corporation's officers and employees actually handle or dispose of the hazardous substances themselves. While the court does not elaborate on its theory of operator liability, it is clear from the court's holding that it would not allow direct liability to be predicated on "the degree of control exerted by the parent over its subsidiary" (*id.* at 18a). Hence, it would not be enough that the parent was involved in "major decision-making and day-to-day operations," actively participated in and controlled "environmental matters," or "exceed[ed] the bounds of an interested investor and enter[ed] the realm of an active operator" (*id.* at 111a). That interpretation cannot be reconciled with the ordinary meaning of the term "operate." See pp 19-25, *supra*.

plies "'[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)." 42 U.S.C. 9607(a). Hence, Congress has explicitly directed the courts not to create extra-statutory exceptions to the liability standard set out in the statutory text.

The court of appeals' result is unsound for other reasons as well. Congress legislates "against the background of the total *corpus juris* of the states," *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1996) (internal quotation marks omitted), but it frequently legislates precisely because state law is inadequate to resolve national problems, and it structures federal legislation in ways designed to prevent state law from becoming an obstacle to the achievement of national objectives. This Court has therefore been rightly skeptical when parties attempt to avoid or distort federal obligations by invoking state law rules governing corporate formalities. Federal law manifests a concern with "realities not forms." *Anderson* v. *Abbott*, 321 U.S. 349, 363 (1944).[22]

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[22] See *Anderson*, 321 U.S. at 363 ("We are dealing here with a principle of [National Bank Act] liability which is concerned with realities not forms. * * * To allow this holding company device to succeed would be to put the policy of double liability at the mercy of corporation finance."); see also, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 772-773 (1984) (rejecting use of the intra-enterprise conspiracy doctrine under the Sherman Act because it "looks to the form of an enterprise's structure and ignores the reality"); *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (repeating, in the context of the Foreign Sovereign Immunities Act, Justice (then Judge) Cardozo's warning "against permitting worn epithets" respecting piercing the corporate veil "to substitute for rigorous analysis"); *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 403-404 (1960) (holding that the liability of a parent corporation under the National Labor Relations Act depends "on whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities").

Such skepticism is justified here. The state courts have developed rules respecting derivative liability, such as "corporate veil-piercing," to provide equitable relief in situations where it is just to charge one entity with responsibility for the actions of another. It may be appropriate to conclude that Congress has implicitly adopted those rules, to the extent that they are consistent with legislative intent, to supplement the reach of a federal liability standard. In particular, it may be reasonable to employ a state veil-piercing rule for the same reason that it is applied in the state court system: *viz.*, to ensure that an entity that has, in fact, violated a legal standard is not absolved of liability based on distinctions of corporate form.[23]

The court of appeals' decision in this case, however, rests on a different principle. As we have explained, CERCLA by its plain terms imposes liability not only on entities that "owned" a facility, but also on entities that "operated" the facility. CERCLA makes clear that "Congress has singled out operators for liability, irrespective of their corporate form." Pet. App. 35a (Ryan, J., dissenting). The court nevertheless concluded that a state veil-piercing rule should be applied to *contract* the express terms of a federal liability standard based on considerations of corporate form and to *immunize* a corporate entity that would be liable under the plain terms of the fed-

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[23] The district court's decision respecting Aerojet's liability as a "present owner" of the Muskegon site under Section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1), illustrates that point. The court concluded that Aerojet was not directly liable as a "present owner," because legal title rests with its Cordova/Michigan subsidiary. Pet. App. 119a. The court nevertheless considered whether Aerojet could be held derivatively liable as a "present owner" under the CERCLA liability scheme under Michigan's veil-piercing rules. *Id.* at 120a-122a. The court of appeals rejected the district court's interpretation of Michigan law, but it did not dispute that a veil-piercing inquiry would be appropriate in that context. *Id.* at 20a-21a.

eral statute. That use of state law subverts congressional intent by insulating from liability entities that had, in fact, actually "operated" the site. *Id.* at 67a-77a, 94a-100a, 110a-112a, 123a-124a.[24]

Congress imposed direct liability on both "owners" *and* "operators" to ensure that all of the entities that were actually responsible for creation of the hazardous conditions would share responsibility for the costs of response. It is therefore unsound to infer that Congress implicitly adopted state veil-piercing rules that would frustrate that objective. That interpretation would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). Indeed, that result could shield from liability those parties who, by virtue of their specific conduct, were most responsible for creating the dangerous conditions and precipitating the need for a federal response. See, *e.g.*, Pet. App. 65a-77a, 110a-112a (describing CPC's extensive role as an "active operator" of the Muskegon site).

In short, Congress has created a federal liability standard, and the express terms and objectives of the standard should not be thwarted by application of inapposite state law. See, *e.g.*, *Anderson*, 321 U.S. at 365. This Court has repeatedly rejected, in a wide variety of statutory contexts, similar attempts to defeat the clear import of federal statutes, or to distort their application, through the invocation of state law principles respecting corporate form. See, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*,

[24] The district court recognized this principle and correctly concluded that it need not engage in the veil-piercing inquiry with respect to their liability as past operators, because the facts respecting CPC's and Aerojet's active participation in and control over the Muskegon site established that they had in fact operated the site within the meaning of the plain terms of the federal standard. Pet. App. 112a, 123a-125a.

467 U.S. 752, 772-773 (1984) (Sherman Act); *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-633 (1983) (Foreign Sovereign Immunities Act); *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Serv., Inc.*, 380 U.S. 255, 256 (1965) (National Labor Relations Act); *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 403-404 (1960) (same); *Anderson*, 321 U.S. at 361-363 (Federal Reserve Act and National Bank Act). The lower courts have likewise repeatedly rejected such attempts to avoid the reach of federal legislation.[25]

[25] See, *e.g.*, *Alman* v. *Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986) (in deciding whether a parent corporation may be held liable for acting through a subsidiary under the Employment Retirement Income Security Act, "federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine.") (quoting *Town of Brookline* v. *Garusch*, 667 F.2d 215, 221 (1st Cir. 1981); *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 437 (2d Cir. 1974) ("We do not think Congress meant the policies of [the Federal Trade Commission Act] to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes.") (internal quotations marks omitted); *Bowater S.S. Co.* v. *Patterson*, 303 F.2d 369, 372 (2d Cir.) ("Assuming, as we may, that [separate companies] had sufficient independence to be regarded, in contract or tort litigation, as separate both from the ultimate parent * * * and from each other, it does not follow that they ought be so regarded for application of the Norris-LaGuardia Act. Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked, or answered, *in vacuo*'; the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law.") (citations omitted), cert. denied, 371 U.S. 860 (1962). See generally Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996).

3. The practical consequences of the court of appeals' decision

The court of appeals' creation of a judge-made exception to the plain terms of Section 107(a)(2) would undermine Congress's specific purposes in enacting a comprehensive and national regulatory scheme for the cleanup of hazardous waste sites. It would frustrate Congress's intent to provide a national solution to the nationwide public health and environmental problems resulting from hazardous waste disposal.[26] The court of appeals' decision would subject a responsible party's liability to the vagaries of individual state law standards regarding the equitable doctrine of corporate veil piercing, resulting in inconsistent findings of liability under CERCLA, and encouraging the kind of geographic disparities that Congress sought to avoid.[27]

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[26] Congress found that the national scale of the problem required uniform regulation that only federal legislation could create. See S. Rep. No. 848, *supra*, at 11; 126 Cong. Reg. 31,968-31,969 (1980) (remarks of Rep. Florio, a principal sponsor of CERCLA); see also *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22, 31 (D. Mass. 1987) ("One can hardly imagine a federal program more demanding of national uniformity than environmental protection.").

[27] See S. Rep. No. 848, *supra*, at 11 (explaining the need for CERCLA because accidents or other incidents involving hazardous substances release are subject to "laws which vary from State to State"). Standards for piercing the corporate veil vary widely from State to State. See note 18, *supra*, see also Phillip I. Blumberg & Linda Evans Blumberg, *The Law of Corporate Groups: Substantive Law* 169-181 (1987) (reviewing the state law variations in corporate veil piercing standards for tort liability); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853, 854 (1982) (observing that "different states have adopted widely divergent and sometimes contradictory standards under the general rubric of the alter ego doctrine").

The court of appeals' holding would thwart the fundamental policy expressed in CERCLA that those who are responsible for creating hazardous conditions, rather than the innocent public, should bear the costs of responding to those hazards.[28] When a parent corporation steps beyond its role as a stockholder of a subsidiary and actually participates in the day-to-day operation of a subsidiary and its facility, CERCLA dictates that the corporation should be responsible, together with other parties that owned or operated the facility, for the costs of cleanup. The court of appeals' rule would absolve parent corporations of liability, even though they participated in the operation of the facility and share responsibility for the conditions at the site. That result would diminish the fairness of CERCLA's liability provisions, which subject parties to liability on the basis of their actions rather than their corporate form.[29]

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[28] See S. Rep. No. 848, *supra*, at 13; H.R. Rep. No. 1016, *supra*, Pt I, at 17; see also *United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 n.8 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *Dedham Water Co.*, 805 F.2d at 1081. The liability provision reflects a policy of "fairness and equity" by ensuring that cleanup costs "are borne by the persons who create such risks rather than by the injured parties who are powerless to protect themselves." S. Rep. No. 848, *supra*, at 33. Imposition of liability on "those who caused chemical harm * * * assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business." *Id.* at 13.

[29] This case particularly illustrates why Congress empowered the United States to seek cost recovery from parent corporations in appropriate situations. The Muskegon site is "one of the nation's most severely contaminated areas." Pet. App. 56a. The total expenditures for cleaning up hazards left by its owners and operators will likely exceed $100 million. Among potentially responsible parties, Ott I, Ott II, and Story no longer exist, while the Cordova companies, from the outset, have had little capital. See *id.* at 93a, 99a-100a. Hence, CPC and Aerojet are not only responsible for the hazardous conditions at the

D. The District Court Correctly Applied The Federal Liability Standard To The Evidence And Properly Concluded That CPC And Aerojet, During Separate Time Periods, Had Each Operated The Muskegon Site

1. The district court's identification of the legal standard

The district court correctly recognized that the express language of Section 107(a)(2) imposes liability on those persons who have "operated" a contaminated facility, regardless of their relationship with the owner of the facility. Applying prevailing law, the court concluded that a parent corporation may be held directly liable under Section 107(a)(2) as an operator of its subsidiary's facility when it actively participates in, and exercises control over, the operations of the subsidiary in a manner that constitutes operation of the facility. See Pet. App. 104a-108a.[30]

Muskegon site, but they are also the only responsible parties that can contribute meaningfully to the cleanup of the site.

[30] The district court followed the approach of *Kayser-Roth*, in which the First Circuit declared that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership." 910 F.2d at 27. "At a minimum, it requires active involvement in the activities of the subsidiary." *Ibid*. As the Third Circuit has explained:

> The factors courts should consider focus on the extent of the corporation's involvement in the other corporation's day-to-day operations and its policy-making decisions. We understand the actual control standard to hold accountable for environmental violations those corporations which are not mere investors in other corporations, but instead have actively and substantially participated in the corporation's management.

Lansford-Coaldale, 4 F.3d at 1222 (citation omitted). Under the Third Circuit's "actual control" standard, a corporation must have made "the day-to-day operating decisions concerning the facility or exercised 'pervasive control' over its policymaking." *Beazer East*, 124 F.3d at

Under familiar principles of corporate law, a parent corporation can, and typically does, exercise general authority over a wholly-owned subsidiary through stock ownership, which allows the parent to choose the subsidiary's board of directors and to vote on general matters of corporate governance put forward by the board. See 2 *Fletcher Cyclopedia of the Law of Private Corporations* § 505 (1990); Harry G. Henn & John R. Alexander, *Laws of Corporations* § 207 (1983). The district court recognized that the parent corporation's exercise of those traditional powers does not in itself result in CERCLA liability. Pet. App. 107a.[31]

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564. As the Eleventh Circuit has further noted, in determining whether a corporation has "operated" a facility within the meaning of Section 107(a)(2), a court should "seek more than just indicia of a parent-subsidiary relationship," and in doing so, may look for evidence that would demonstrate that a parent corporation was actively involved in a subsidiary's "occupational business affairs" or that the parent itself actually participated in the contamination. *Jacksonville Elec. Auth.*, 996 F.2d at 1111.

[31] As the Third Circuit in *Beazer East* recently concluded, the mere fact that two corporate shareholders, by virtue of their stock ownership, each elected two members to the board of directors of the corporation at issue in that case is not sufficient to establish the "actual control" necessary to impose CERCLA operator liability. 124 F.3d at 563-565. That conduct is entirely consistent with the investment relationship among the parties and, therefore, absent evidence that the corporate shareholders exercised control over the day-to-day operating decisions of the corporation, cannot be the basis for liability as an operator of that corporation's facility. In contrast to the instant case, the district court in *Beazer East* found that the board of directors did not become involved in the corporation's day-to-day management, its plant operations, or in any waste management practices. Rather, the board simply performed the functions typically performed by boards of directors, including oversight of the corporation's assets and liabilities, approval of the corporation's mission and strategy, and the hiring of upper management.

By virtue of its controlling stock ownership, a parent corporation will frequently place its officers on the board of the subsidiary. The district court properly recognized that such participation will not, by itself, result in CERCLA liability. Although a board of directors has nominally broad authority, the typical board cannot and does not "manage all of the business of a large company in the usual sense of that term." Edward Brodsky & M. Patricia Admanski, *Law of Corporate Officers and Directors; Rights, Duties, and Liabilities* § 1.02 (1997). Rather, the typical board delegates the day-to-day management to executive officers and monitors their performance. *Ibid.*; see Henn & Alexander, *supra*, at §§ 219, 223; Harvey Gelb, *Director Due Care Liability: An Assessment of the New Statutes*, 61 Temple L. Rev. 13, 14 (1988).

Thus, in the usual situation, the subsidiary's own executive officers, acting on behalf of the subsidiary, are responsible for managing the subsidiary and "operating" the subsidiary's facility. If the parent corporation, however, departs from the typical practice and employs its own agents as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, "operating" the subsidiary's facility. The factual inquiry for a court is whether the evidence demonstrates that the parent corporation's officers exercised control over the operations and management of the subsidiary's activities in a way that establishes that those officers actually participated in the operation of the subsidiary's facility. See Pet. App. 105a-107a.[32]

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[32] While the district court recognized that the determination of whether a parent corporation has "operated" a facility requires an inherently fact-based inquiry into the totality of circumstances presented, the court articulated some of the factors it considered relevant to deciding whether each parent corporation was an operator-in-fact of the Muskegon facility, including: the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal; the facts leading up to the subsidiary's origin and the reasons for its existence; and to a lesser extent, the parent's level of financial monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions. Pet. App. 107a-108a.

2. The district court's application of the legal standard to the facts of this case

The district court made extensive factual findings in support of its conclusion that CPC and Aerojet, during separate time periods, each operated the Muskegon site through the decisionmaking hierarchies of their respective wholly owned subsidiaries. See Pet. App. 58a-100a. While the court of appeals held that the district court had applied the wrong standard of liability, the court of appeals did not reject or cast doubt on any of the district court's factual findings and, indeed, relied on them. See *id.* 16a-17a, 20a-22a. They therefore may be treated as conclusive in this Court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

a. *CPC*. In the case of CPC, the district court found that the corporation had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site. See Pet. App. 67a-77a, 110a-112a. Those CPC officers, including Arnold Ott, James Eiszner, and Beverly Warner, "exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id.* at 71a.

For example, the district court found that Beverly Warner, who worked out of CPC's headquarters in New York while president of CPC's development company and Ott II's chief executive officer, "controlled decisions including production, pricing and plant operations at Ott II," which "actually undermined" the operations of Ott II. Pet. App. 70a-71a. According to James Eiszner, who eventually became CPC's chief executive officer, Warner "'made some terrible, terrible management decisions which were probably what led'" to the sale of Ott II in 1972. *Id.* at 71a (quoting Eiszner's criticisms). Indeed, Eiszner himself was criticized during his tenure as an Ott II executive officer by the Ott II board of directors for paying too much attention to the interests of CPC. *Ibid.*

Significantly, CPC also actively participated in Ott II's environmental matters at the Muskegon site. CPC's environmental affairs director, G.R.D. Williams, coordinated all pollution activities for CPC and its divisions and subsidiaries and became "heavily involved" in environmental issues and setting environmental policies at Ott II. Pet. App. 74a-75a. For example, as a result of Williams' direct participation in Ott II's waste disposal matters and discussions with Michigan state officials, Ott II's officers abandoned plans for a biological waste treatment facility at the Muskegon site despite recommendations of the subsidiary's plant manager and outside consultants that biological treatment was necessary. *Id.* at 75a; C.A. App. 1987, 1996, 2160, 2180 (Trial Exhs. 322, 323, 355, 358; Trial Tr. 12-14, C.A. App. 800). Moreover, Williams repeatedly controlled the interaction between Ott II officials and state and federal regulators regarding waste disposal and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." Pet. App. 75a-76a. Similarly, it was a CPC attorney, Hanes Heller, who negotiated with the State of Michigan

to obtain the use of a county wastewater treatment system for the operations at the Muskegon site. *Id.* at 76a.

Furthermore, the district court found that CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to its subsidiary in excess of $5 million from 1965 to 1971 and assumed several of the subsidiary's loans. Pet. App. 77a. In addition, Ott II's funds were commingled with CPC's funds. CPC also limited the amount of capital expenditures permitted by Ott II without prior approval from CPC's board of directors or development company. *Ibid.* CPC officials also repeatedly participated in the labor and other business matters of Ott II. *Ibid.*

Based on these and many other findings, the district court determined that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." Pet. App. 111a. The district court correctly found that CPC actively participated in, and exercised control over, the Muskegon site. The district court properly concluded that CPC is therefore liable under Section 107(a)(2) as an operator of the Muskegon site. *Id.* at 112a.

b. *Aerojet*. The district court found that Aerojet similarly engaged in active participation and control with respect to the operation of the Muskegon site during a later time period. Pet. App. 94a-100a, 123a-124a. During the relevant time period, the subsidiaries' boards were "inactive and nearly nonexistent." *Id.* at 96a. Aerojet's high-level corporate officers dominated the management of the wholly owned subsidiaries and thereby controlled the policymaking and decisionmaking in all facets of the subsidiaries' business at the Muskegon site, including sales, marketing, manufacturing and waste disposal. *Id.* at 97a-99a. In fact, Aerojet so completely controlled the finances of the Cordova companies that neither subsidiary was permitted to maintain separate bank accounts. *Id.* at 99a.

As with CPC's involvement with its subsidiary, Aerojet's participation in and control over the management and decisionmaking at the Cordova companies shows that Aerojet "operated" the facility at the Muskegon site. Pet. App. 124a. Aerojet noted in the court of appeals that "[w]here a parent corporation actively participates in its subsidiary's management at the time the subsidiary is disposing of its waste at its facility, the parent corporation has the control necessary to be subject to liability under CERCLA as an operator of its subsidiary's waste disposal sites." Aerojet C.A. Br. as Appellee at 32. Furthermore, Aerojet has not contested in the court of appeals, or in its brief in opposition in this Court, that the record demonstrates the "active participation and actual control" necessary to establish that Aerojet "operated" the Muskegon site. Instead, Aerojet has attempted to avoid liability on other grounds. See Aerojet Br. in Opp. at 11-17. This Court should accordingly reverse the court of appeals' judgment with respect to Aerojet's liability as an operator under Section 107(a)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 101(20) through (21) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) 42 U.S.C. 9601 *et seq.*, provides in relevant part:

§ 9601. Definitions

* * * * *

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

* * * * *

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened

release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

(E) Exclusion of lenders not participants in management

(i) Indicia of ownership to protect security

The term "owner or operator" does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

(ii) Foreclosure

The term "owner or operator" does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 9607(d)(1) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or

facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(F) Participation in management

For purposes of subparagraph (E)—

(i) the term "participate in management"—

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

(I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken

responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

(aa) for the overall management of the vessel or facility encompassing day-to-day decision-making with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term "participate in management" does not include—

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition

that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under section 9607(d) of this title or under the direction of an on-scene

coordinator appointed under the National Contingency Plan,

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(G) Other terms

As used in this chapter:

* * * * *

(ii) Financial or administrative function

The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

* * * * *

(v) Operational function

The term "operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

* * * * *

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. 9601(20) - (21) (Supp. II. 1996).

Section 107(a) through (b) of CERCLA provides in relevant part as follows:

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; * * *

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

* * * * *

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against

foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs. –

42 U.S.C. 9607(a) - (b).

(8)

Supreme Court, U.S.
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No. 97-454
In the Supreme Court of the United States
October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CPC INTERNATIONAL, INC., et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE

This case involves actions by the Petitioner, the United States, on behalf of the Environmental Protection Agency ("EPA") and by the Michigan Department of Environmental Quality ("MDEQ")[1] to recover environmental response costs for cleanup at one of the most severely contaminated sites in the country. MDEQ supports the position of the United States on the question presented: whether a parent corporation can be held directly liable under section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(2). For reasons unrelated to the question presented in the case at hand, MDEQ seeks reversal of the United States Court of Appeals for the Sixth Circuit's decision only as it pertains to the liability of CPC International, Inc. ("CPC"). Of relevance here, MDEQ and EPA sought to recover their costs from CPC, a parent corporation that actively participated in the operation of a chemical manufacturing facility owned by its subsidiary, located near Muskegon, Michigan, at the time hazardous substances were improperly disposed of at the site. The operative facts relevant to CPC's conduct are not in dispute. What is at issue is whether these facts support a finding of liability under the proper legal standards.

Ott Chemical Company ("Ott I") operated a chemical manufacturing facility on the site from 1959 to 1965. From 1965 to 1972 the site was owned and operated by a wholly-owned subsidiary of CPC, known as the Ott Chemical Company ("Ott II"). In 1972 Ott II/CPC sold the facility to Story Chemical Company. CPC's liability arises from its operation at the site from 1965 to 1972. Extensive contamination occurred during this time period.

During the Ott I and Ott II eras, chemical wastes were disposed of in unlined lagoons and hundreds of drums containing hazardous wastes were buried in a sandy pit. Hundreds of gallons of chemicals were spilled from train cars onto railroad tracks, hazardous substances were dumped in

[1] On August 1, 1995, Governor John Engler issued Executive Order No. 1995-18, creating the Michigan Department of Environmental Quality (MDEQ) and transferring specified powers, authorities and duties from the former Michigan Department of Natural Resources, the named party in the courts below, to the MDEQ.

the woods, and there were frequent overflows of chemical wastes at a cement lined equalization basin. *CPC Int'l, Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 556 (W.D. Mich. 1991); App. 60-61a. As a result of these disposal practices, the soil, surface water, and groundwater at the site became contaminated with a variety of hazardous substances.

This case was filed in the U.S. District Court for the Western District of Michigan pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. CPC initiated this litigation by filing claims against MDEQ, Aerojet General Corporation ("Aerojet") and its subsidiaries, Cordova Chemical Company of California and Cordova Chemical Company of Michigan (the "Aerojet entities"), for contribution under CERCLA. *CPC Int'l, Inc. v. Aerojet General Corp., et. al.* (District Court Case No. 89-10503). MDEQ filed a counterclaim against CPC and a cross claim against Aerojet and its subsidiaries for cost recovery and contribution. The Aerojet entities also filed counterclaims against CPC and cross claims against MDEQ. The United States, on behalf of the EPA, filed a separate action asserting CERCLA cost recovery claims against CPC, the Aerojet entities and Arnold Ott. *United States v. Cordova Chemical Co., et. al.* (District Court Case No. 89-0961). The two actions were consolidated for discovery, trial and appeal.

After a fifteen-day bench trial, in which twenty-nine witnesses presented live testimony and more than 2,300 exhibits were admitted into evidence, the district court made extensive factual findings. *CPC Int'l, Inc.*, 777 F. Supp. at 555-70; App. 58-100a. CPC did not challenge the factual determinations of the district court, nor did the Court of Appeals find any of the factual findings to be clearly erroneous.

The district court made comprehensive and detailed findings of fact on which it based its legal conclusion that CPC was an operator of the facility in question, the former chemical manufacturing plant and associated property located in Dalton Township, Michigan. CPC directed operations at the facility. "CPC officials exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id*. at 559; App. 71a. CPC's control and decision-making authority were evidenced in all aspects of Ott II affairs, including environmental, financial aspects and labor negotiations. *Id*. at 562; App. 74-77a. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II. *Id*.; App. 77a.

In particular, CPC's control of Ott II's environmental affairs was so pervasive that Ott II could not make a decision or even fill out a governmental questionnaire without the approval of CPC management. CPC's governmental and environmental affairs director, G.R.D. Williams, coordinated all pollution activities for CPC and its divisions and subsidiaries, including Ott II. Mr. Williams became actively involved in environmental affairs at Ott II, including participating in negotiations with state regulators on waste disposal issues, suggesting stall tactics in dealing with state regulators, and directing Ott II on how to respond to inquiries from state and federal regulators. He actively participated in and exerted control over Ott II environmental matters. *Id*. at 561; App. 74-76a.

It is clear from the district court's findings of fact, that the court did not base its decision solely on the fact that CPC controlled the Ott II Board of Directors. The decision was also based on the policies and actions of individual CPC officials. Based upon the factual findings, the district court held CPC directly liable as an operator of the facility at the time of disposal under section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2):

> Liability attaches here because the evidence shows active participation and control by CPC in Ott II affairs both internally through the subsidiary's board and management and externally through the policies of the development company and the actions of individual CPC officials. *The evidence shows a level of participation and control by CPC that exceeds the*

> *bounds of an interested investor and enters the realm of an active operator.* When a parent corporation permeates the board, management and decision-making of a wholly owned subsidiary that was disposing of hazardous waste, operator liability directly attaches under CERCLA.

Id. at 575; App. 111-112a (emphasis added).

On appeal, a divided panel of the Court of Appeals reversed the district court's determination that CPC is liable as an operator. *United States v. Cordova Chemical Co.*, 59 F.3d 584, 590 (6th Cir. 1995); App. 130a, *vacated*, 67 F.3d 586 (6th Cir. 1995); App. 171a. The panel majority concluded that, as a matter of law, "a parent corporation incurs operator liability pursuant to subsection 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met." *Id.* at 590; App. 143a.

Judge Ryan, dissenting, concluded that a parent corporation, like any other "person" as defined in CERCLA, could be held liable as an operator under section 107(a)(2) and the question as to whether CPC was an operator of the facility is simply a question of fact; *i.e.*, whether the parent corporation was an operator-in-fact of the facility. *Id.* at 594; App. at 152-153a.

Petitions by the United States and the MDEQ for rehearing *en banc* were granted and the panel decision was vacated. *United States v. Cordova Chemical Co.*, 67 F.3d 586 (6th Cir. 1995); App. 171a. An *en banc* Opinion was issued on May 13, 1997. *United States v. Cordova Chemical Co.*, 113 F.3d 572 (6th Cir. 1997); App. 1a. In a divided decision, the seven member *en banc* majority held that a parent corporation will be liable only when the requirements to pierce the corporate veil under state law are met.

The dissenting opinion of Judge Ryan, in which four other judges joined, would have affirmed the district court decision finding CPC liable. It emphasized that the district court's findings concerning CPC's pervasive control of Ott II's

activities at the facility were not found clearly erroneous, and based upon the findings of actual control, CPC was directly liable as an operator under section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

Respondent, MDEQ, filed a Petition for Writ of Certiorari on August 8, 1997, *Michigan Department of Environmental Quality v. CPC, International, Inc.*, Supreme Court No. 97-296, seeking review of the issue as to whether a parent corporation can be held directly liable under section 107(a)(2) of CERCLA. Petitioner, United States, filed a Petition for Writ Of Certiorari on September 10, 1997 seeking review of the same legal issue. The United States' Petition was granted on December 12, 1997.

SUMMARY OF THE ARGUMENT

1.) The Court of Appeals decision, finding that a parent corporation can only be held liable as an operator under CERCLA by piercing the corporate veil, is inconsistent with the plain language of CERCLA. Under CERCLA's statutory scheme, any person who operates a facility at the time of disposal of hazardous substances, is strictly liable as an operator. This includes a parent corporation that exerts control over its subsidiary to the extent that the parent corporation is the actual operator of the facility. The definition of "person" under CERCLA is broad and includes parent corporations. In the case at hand, CPC operated the facility at the time hazardous wastes were disposed. Corporate veil piercing under state law is not relevant to the issue of whether a parent corporation can be held directly liable as an operator under CERCLA.

2.) The Court of Appeals decision is in direct conflict with decisions in the First, Second, Third, and Eleventh Circuits. *See: Certain Underwriters at Lloyds, London v. St. Joe Minerals Corp.*, 90 F.3d 671 (2d Cir. 1996); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), and *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991). In

all of the above-cited cases the courts have held that a parent corporation may be held directly liable as an operator without piercing the corporate veil.

ARGUMENT

I

THE PLAIN LANGUAGE OF CERCLA PROVIDES THAT A PARENT CORPORATION IS DIRECTLY LIABLE AS AN OPERATOR WHERE IT HAS ACTIVELY PARTICIPATED IN, AND EXERCISED CONTROL OVER, THE SUBSIDIARY'S BUSINESS, REGARDLESS WHETHER ITS CONDUCT IS SUFFICIENT UNDER STATE LAW TO PIERCE THE CORPORATE VEIL.

The Court of Appeals' decision, holding that a parent corporation can only be held liable as an operator under CERCLA when the standards for piercing the corporate veil are met under state law, is not supported by the plain language of section 107(a) of CERCLA. This case involves a simple matter of federal statutory construction and state common law veil piercing standards do not apply.[2]

In order to establish liability under CERCLA one must prove that: 1) a release of a hazardous substance has occurred, 2) at a facility, 3) causing a plaintiff to incur response costs, 4) and the defendant is a responsible party as defined under section 107(a) of CERCLA, 42 U.S.C. § 9607(a). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *United States v. Aceto Agricultural Chemical Corp.*, 872 F.2d 1373 (8th Cir. 1989). The parties have stipulated to the first three elements set forth above. The issue in the case at hand involves the interpretation of the fourth

[2] Although it is MDEQ's position that veil piercing analysis is not relevant to the question of operator liability under CERCLA, it should be noted that the Court of Appeals majority applied the wrong standard for piercing the corporate veil under Michigan law. The district court opinion and Judge Ryan's dissenting opinion sets forth the correct standard under Michigan law. *See CPC Int'l Inc.*, 777 F. Supp. at 574, 578-579, App. 108-110a, 120a-121a; *Cordova Chemical Co.*, 113 F.3d at 591-593, App. 45-47a.

element, or whether CPC is a responsible party under 42 U.S.C. § 9607(a). Section 107(a) reads, in part, as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --
>
> * * *
>
> (2) *any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,*
>
> * * *
>
> *. . . shall be liable for*
>
> *(A) all costs of removal or remedial action incurred by the United States Government or a State . . . .*

42 U.S.C. § 9607(a) (emphasis added).

The term "owner or operator" is defined by section 101(20)(A)(ii) of CERCLA, 42 U.S.C. § 9601(20)(A)(ii), as any person owning or operating such facility. The parties stipulated that CPC is a "person" for purposes of the statute. One court has found that the circularity of the definition "strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings". *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988). As the dissenting opinion in the case at hand noted, the definition of owner in 42 U.S.C. § 9601(20)(A)(iii) explicitly excludes one whose ownership interests is merely that of a stockholder who does not participate in the management of a facility, "suggesting that one who does participate in management is accordingly susceptible to liability". *Cordova Chemical Co.*, 113 F.3d at 587 (Judge Ryan, *dissenting*) (*citing Kayser-Roth Corp.*, 910 F.2d at 26, n. 6; App. 33a.

The definition of "owner or operator" indicates that Congress intended to impose liability on any entity actually operating a facility at the time of disposal of hazardous

substances. The form of the operator, be it a parent corporation, individual or other entity, is irrelevant. Numerous courts have imposed liability on the entity actually operating the facility, without regard to the entity's interest in the facility or its corporate form. *Certain Underwriters at Lloyds, London*, 90 F.3d 671 (parent corporation); *Schiavone*, 79 F.3d 248 (parent corporation); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (*en banc*) (federal government); *Lansford-Coaldale Joint Water Authority*, 4 F.3d 1209 (parent corporation); *Jacksonville Elec. Auth.*, 996 F.2d 1107 (parent corporation); *John S. Boyd Co.*, 992 F.2d 401 (parent corporation); *Kaiser Aluminum and Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992) (contractor/excavator); *Kayser-Roth Corp.*, 910 F.2d 24 (parent corporation); *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), *cert denied*, 117 S. Ct. 50 (1996) (parent corporation); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992), *cert. denied, 506 U.S. 940 (1992)* (tenant); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417 (7th Cir. 1994) (corporate officer); *U.S. v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), *cert. denied*, 516 U.S. 817 (1995) (employee).

The interpretation that a parent corporation can be held liable as an operator is also supported by the definition of "person":

> The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. § 9601(21). This definition clearly encompasses a parent corporation, and the parties have stipulated that CPC is a "person." *CPC Int'l, Inc.*, 777 F. Supp. at 556; App. 36a.

> "[P]erson" is defined broadly to include a firm, corporation, or commercial entity, among other things. CERCLA's language, therefore, indicates an intent to hold a corporation liable for the environmental violations of its subsidiaries

> and sister corporations, if it is otherwise determined to have operated the facility in question.

Lansford-Coaldale, 4 F.3d at 1221, n. 11. *Also see*: *Schiavone*, 79 F.3d at 255; *Kayser-Roth*, 910 F.2d at 26, n. 5.

The Court of Appeals majority found that nothing in the statute warrants disregard of the "time honored limited liability protections afforded by the corporate form", and adopted language from the Fifth Circuit: "[I]f Congress wanted to extend liability to parent corporations it could have done so and remains free to do so." *Cordova Chemical Co.*, 113 F.3d at 579-80; App. 14a; *citing Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991). Both the Court of Appeals decision in the case at hand and the Fifth Circuit's decision in *Joslyn Mfg. Co.* ignore the broad definition of "person" which clearly encompasses any corporation, including a parent corporation. The plain language of CERCLA supports the district court's decision that a parent corporation can be held directly liable as an operator under CERCLA.

The courts which have considered the liability of parent corporations have developed various approaches for determining whether a parent corporation is an operator of a facility. The district court followed the approach set forth in *Kayser-Roth*, 910 F.2d at 27:

> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

Factors to consider in assessing whether a parent corporation operated its subsidiary include the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal. In addition, determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful in determining whether the parent has operated a wholly owned subsidiary. Other evidence may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.

CPC Int'l, Inc., 777 F. Supp. at 573; App. 107-108a.

The standard set forth by the district court is in accordance with the majority of other courts that have considered the issue. *See: Kayser-Roth*, 910 F.2d at 27; *John S. Boyd*, 992 F.2d at 408; *Certain Underwriters*, 90 F.3d at 674; *Lansford-Coaldale*, 4 F.3d 1209; *Jacksonville Electric*, 996 F.2d 1107. This is a workable, fact specific inquiry which Respondent urges this Court to adopt.[3] This standard also promotes uniformity in the application of operator liability under CERCLA. Under the Court of Appeals' standard, liability of a parent corporation will vary from state to state

[3] Although most of the courts considering the issue have found that actual control and active involvement with the activities of its subsidiary is necessary to establish operator liability, other courts have held that the authority to control is sufficient for establishing operator liability. *See: Nurad*, 966 F.2d at 842; *Kaiser Aluminum*, 976 F.2d at 1344. *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 670-71 (D. Idaho 1986); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Penn. 1989); *Kelley v. Thomas Solvent*, 727 F. Supp. 1532 (W.D. Mich. 1989). In adopting this standard the *Nurad* court reasoned it "placed accountability in the hands of those capable of abating further environmental harm".

due to the fact that states have different common law standards for piercing the corporate veil.

At trial, MDEQ and EPA proved that CPC had the ability to control and did, in fact, control the facility. The district court found that contamination occurred during the time period Ott II/CPC operated the site:

> The principal source of contamination at the site was the use of engineered, unlined lagoons at the northwestern edge of the site for chemical waste disposal. From 1959 to at least 1968, during the Ott I and Ott II periods of ownership, wastewaters and other chemical waste used in the manufacturing process were discharged into the lagoons, where much of the contaminants seeped into the ground and water. No disposal into the lagoons occurred during the Story and Cordova periods.
>
> During the Ott I and Ott II era, chemical waste also entered the ground through the burial and slitting of hundreds of drums in a sandy pit; numerous spills of hundreds of gallons of chemicals from train cars onto railroad tracks; frequent overflows of chemical waste at a cement-lined equalization basin; and the dumping into the woods of buckets of hazardous chemicals that had spilled during the manufacturing process. Some spills of hazardous waste also occurred during the Story and Cordova periods of ownership.
>
> Contamination entering the ground from disposal in the lagoons or through spills then seeped into the ground and migrated away from the site via the aquifer to the southeast, ultimately reaching two waterways, Little Bear Creek and the Unnamed Tributary.

CPC Int'l, Inc., 777 F. Supp. at 556; App. 60-61a.

The district court also found that the environmental problems at the site were exacerbated by CPC's involvement at the site:

> Following (CPC's) acquisition, Ott II's production capacity significantly increased as CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons, which were expanded to accommodate the additional wastes.

CPC Int'l, Inc., 777 F. Supp. at 558; App. 67a.

During the Ott II era, CPC was directly involved in the operation at the facility. The district court made extensive findings of fact as to CPC's pervasive control of the site. *CPC Int'l, Inc.*, 777 F. Supp. at 557-562, 575; App. 61-77a, 110-112a. The district court found that CPC actively participated in and at times controlled the policy-making decisions of its subsidiary through its representation on the Ott II Board of Directors. CPC had majority control of the Ott II board for three years. CPC directors serving on the Ott II board reported back to CPC about Ott II programs and gave approval on behalf of CPC for appropriation requests. During CPC's entire period of ownership of Ott II, the chairman of the Ott II board was always a top-ranking CPC executive. CPC matters were discussed at board meetings, and Ott II board members recognized the need to consider CPC's interest and seek strong guidance from the parent company during these sessions. *Id.* at 558-59; App. 67-69a.

The district court's opinion was not based solely or even extensively on the fact that CPC controlled the Ott II Board of Directors. The district court found that CPC also actively participated in and exerted control over day-to-day decision making at Ott II. CPC actively participated in the decision making by placing high-ranking CPC officers in Ott II management positions. The president of Ott II reported directly to the president of CPC. *Id.* at 559; App. 70a. CPC officials played decisive roles in Ott II's policy-making structure. "CPC officials exerted significant control and bore

ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id.*; App. 71a.

More importantly, the district court also found that CPC's control was especially evident in the area of environmental matters. Numerous exhibits introduced at trial, including internal memoranda between Ott II and CPC, established CPC's control of environmental matters at the facility. See Trial Exhibits: 334, 336, 358, 397, 401, 424, 458, 476, 531, 576, 584, 596, 740, 760, 780, 789, and 799.[4] Ott II could not make an environmental decision or even fill out a governmental questionnaire without the review and approval of CPC management. See Trial Exhibits 746, 789 and 799. The district court found that CPC was directly and extensively involved with environmental matters at Ott II and that CPC actively participated and exerted control over environmental matters. *Id.* at 561; App. 74-76a

CPC also exerted significant control over Ott II's finances and participated in labor negotiations at Ott II. *Id.* at 562; App. 76-77a. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II. *Id.*; App. 76-77a.

Based upon these extensive factual findings the district court held that CPC was liable as an operator. The court found that CPC's active participation and control of Ott II went beyond the bounds of an interested investor and that CPC had permeated the board, management, and decision-making of Ott II. *Id.* at 575; App. 111-112a.

CPC did not challenge any of the district court's factual findings on appeal. The Court of Appeals' *en banc* majority did not find any of the district court's findings of fact clearly erroneous. Instead, the Court of Appeals created a new legal

[4] The exhibits were admitted into evidence as part of the Pretrial Order, District Court Docket Entry Nos. 333-334. See trial transcript at pp. 12-14. The following exhibits were also included in the Court of Appeals Appendix: 334 at page 2031, 336 at page 2034, 358 at page 2180, 397 at page 2189, 476 at page 2251, 531 at page 2260, 584 at page 2268, 780 at page 2312, 789 at page 2314, and 799 at page 2317.

standard that is not supported by the plain language of the statute.

II

THE COURT OF APPEALS DECISION DIRECTLY CONFLICTS WITH DECISIONS IN THE FIRST, SECOND, THIRD AND ELEVENTH CIRCUITS, WHICH HAVE ALL HELD THAT A PARENT CORPORATION CAN BE DIRECTLY LIABLE AS AN OPERATOR UNDER CERCLA.

The Court of Appeals interpretation of CERCLA is in direct conflict with four other Circuit Courts that have found parent corporations directly liable as operators under CERCLA when the parent corporation actively participated in, and exercised control over the activities of the subsidiary. *See: Certain Underwriters at Lloyds, London* (2d Cir.); *Schiavone* (2d Cir.); *Lansford-Coaldale Joint Water Authority* (3d Cir.); *Jacksonville Elec. Auth.* (11th Cir.); *John S. Boyd Co.* (1st Cir.); and *Kayser-Roth Corp.* (1st Cir.); *but see Joslyn Mfg. Co.* (5th Cir.).[5]

In contrast, the Court of Appeals found as follows:

> [W]e . . . hold that where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met. In other words, under the circumstances of this case, whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the

[5] In *Riverside Market Dev. v. Intern Bldg. Products*, 931 F.2d 327 (5th Cir. 1991), *cert. denied*, 502 U.S. 1004 (1991), the Fifth Circuit recognized that an individual corporate officer could be found liable as an operator under CERCLA, if the officer actively participated in the wrongful activities. The court noted that personal liability as an operator is distinct from liability imposed through piercing the corporate veil, indicating that the precedential value of the *Joslyn* decision is limited.

> abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.
>
> . . . Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.

Cordova Chemical Co., 113 F.3d at 580; App. 15a.

The conflict between the Court of Appeals and other circuits was expanded by the divided *en banc* decision in *Donahey v. Bogle*, 129 F.3d 838 (6th Cir. 1997). In *Donahey* the Court of Appeals applied the standard for operator liability set forth in *Cordova Chemical Co.* to an individual who was the 100% shareholder and manager of a corporation. The court held that in order to to find an individual shareholder liable as an operator the elements necessary to pierce the corporate veil must be established. The court appears to apply this standard without regard to the shareholder's involvement in the facility's operations. Thus, under *Donahey* an individual who is involved in day-to-day operations of a facility may not satisfy the Court of Appeals' criteria for establishing operator liability. This holding conflicts with the Fifth Circuit's decision in *Riverside Market Dev.*, the Second Circuit's decision in *New York v. Shore Reality Corp.*, 759 F.2d 1032 (2d Cir. 1985), and the Eighth Circuit's decisions in *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478 (8th Cir. 1992), and *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995).

Under the Court of Appeals decision, the standard for determining whether a parent corporation is liable as either an owner or operator would be the same: the facts must support

piercing the corporate veil.[6] This interpretation ignores the disjunctive character of CERCLA liability, holding both an "owner" and an operator liable. Owner liability and operator liability denote two separate and distinct concepts.

The *Schiavone* court explained the importance of the distinction:

> This distinction has particular relevance in the context of parent and subsidiary corporations where the theory of liability selected mandates different bases of proof. A finding of *owner* liability invokes the parent-subsidiary relationship and can be made only in circumstances that permit corporate veil piercing. *USX Corp.*, 68 F.3d at 823 ("[T]raditional principles of corporate law would not permit 'owner' liability to be extended to a corporate parent unless piercing the corporate veil were warranted."); *John S. Boyd Co.*, 992 F.2d at 408; *Lansford-Coaldale*, 4 F.3d at 1220; *Solvent Chem.*, 875 F. Supp. at 1019. Such *owner* liability is entirely distinct from parent *operator* liability, proof of which looks to the independent actions of the parent corporation, evidenced through its control over the polluting site. *John S. Boyd Co.*, 992 F.2d at 408; *Lansford-Coaldale*, 4 F.3d at 1220; *Solvent Chem.*, 875 F.Supp. 1019. As the Third Circuit has explained:
>
> > Under CERCLA, a corporation may be held liable as an owner for the actions of its subsidiary corporation in situations in which it is determined that piercing the corporate veil is warranted. . . . Operator liability, in contrast, is generally reserved for those situations in which a parent or sister corporation is deemed, due to the specifics of its relationship with its affiliated corporation, to have had substantive control over the facility in question. *Lansford-Coaldale*, 4 F.3d at 1220 (citation omitted).

[6] The majority opinion stated, in response to Judge Ryan's dissenting opinion, that a parent corporation could be held directly liable as an operator "where the parent corporation directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary". *Cordova Chemical Co.*, at 581, App. 17a. The court did not explain what it means by "directly operates the facility . . . as an actual co-operator along side the subsidiary". The court rejected the standard applied by the district court, and thus, has found that pervasive control and involvement in day-to-day operations of the facility is not enough to find that a parent corporation was an actual co-operator of a facility. This clearly conflicts with the generally accepted interpretation of what it means to be an operator under CERCLA. Other than establishing facts that support piercing the corporate veil, one cannot determine what proofs would be necessary, under the majority's interpretation, to establish that a parent corporation was an operator under CERCLA.

Schiavone, 79 F.3d at 254. *Also see*: *Sidney S. Arst. Co.*, 25 F.3d at 420; *Kayser-Roth*, 910 F.2d at 26; *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. 36-38a.

The Court of Appeals opinion is highly critical of the numerous courts that have relied on CERCLA's remedial goals as justification for interpreting the statute broadly because the legislative history of the statute is sparse. *Cordova Chemical Co.*, 113 F.3d at 577-78; App. 13-14a. The rule that remedial statutes should be liberally construed is firmly established. *Dennis v. Higgins*, 498 U.S. 439, 443; 111 S. Ct. 865, 868 (1991). Although the legislative history of CERCLA may be sparse on specific provisions, the remedial intent of the statute is clear from both the statute itself and its legislative history. *See*: *Anspec Co. Inc. v. Johnson Controls Inc.*, 922 F.2d 1240, 1241 (6th Cir. 1991); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989) *cert. denied*, 494 U.S. 1057; 110 S. Ct. 1527; *Kayser-Roth*, 910 F.2d at 26; *Deadham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Reality*, 759 F.2d 1032, 1045 (2d Cir. 1985); *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

The Court of Appeals concluded that CERCLA should be narrowly construed:

> Thus, while the liability provisions concerning facility operators should be construed so that the financial responsibility falls upon those entities that contributed to the environmental

> problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. . . .
>
> In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to those parties who are culpable in a sense that, they by some realistic measure, helped to create the harmful conditions.

Cordova Chemical Co., 113 F.2d at 578; App. 9-10a.

This proposed "tenet" ignores the text of the statute and the well established principle that liability under CERCLA is both strict and joint and several.[7] *FMC Corp.*, 29 F.3d at 835; *Kayser-Roth*, 910 F.2d at 26. Moreover, as pointed out in the dissenting opinion, the district court decision holding CPC directly liable as an operator does not, in fact, rest exclusively or even primarily on the so-called remedial legislation "litany" denigrated by the majority opinion. *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. 35a.

The Court of Appeals' two other main criticisms of the district court's decision regarding CPC's liability are equally untenable. First, the majority suggests that the district court improperly "replaces the relatively bright line provided by the traditional doctrine of piercing the corporate veil with a nebulous 'control' test." *Cordova Chemical Co.*, 113 F.3d at 580; App. 14a.[8] As discussed, *supra*, however, the actual control test of direct operator liability under CERCLA adopted by the district court and a majority of other Courts of Appeal is both workable and consistent with the statute. The majority

[7] In exonerating CPC from liability, the Court of Appeals ignored its own "tenet" that parties who "helped to create the harmful conditions" should be held liable. *Cordova Chemical Co.*, 113 F.2d at 578; App. 9-10. The district found that CPC did, in fact, control environmental matters at the site, including waste disposal. *CPC Int'l, Inc.*, 777 F. Supp. at 561-562; App. 74-76a. Thus, although it is not necessary to establish culpability under CERCLA, CPC was, in fact, culpable or responsible for the waste problems at the site.

[8] There is no bright line standard for piercing the corporate veil. This is evident by the fact that the Court of Appeals *en banc* panel applied three different standards for piercing the corporate veil. See *Cordova Chemical Co.*, 113 F.3d at 580; App 15-16a (majority opinion); *Id.* at 583-586; App 24-32a (Judge Merritt dissenting) and *Id.* at 590-591; App 45-50a (Judge Ryan dissenting).

opinion's suggestion that this standard is being used to "replace" the veil-piercing doctrine confuses the two alternative, independent bases of liability: direct statutory liability as an operator and common law vicarious liability as an owner through piercing the corporate veil. *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. 36a.

It is clear that the district court did not replace traditional veil piercing with the actual control test. The district court applied the control test in determining whether, as the governments alleged, CPC and Aerojet were each directly liable as an operator under section 107(a)(2) of CERCLA. *CPC Int'l, Inc.*, 777 F. Supp. at 574-575, 579-580; App. 110-113a, 123-125a. As an entirely separate matter, the district court applied the test for piercing the corporate veil to determine if Aerojet, as also alleged by the governments, was vicariously liable as an "owner" of the facility, which was owned by its subsidiary. *CPC Int'l, Inc.*, 777 F. Supp. at 578-578; App. 119-122a.

Second, the majority expressed concern that "the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites". *Cordova Chemical Co.*, 113 F.3d at 580; App. 14a. That stated concern is misplaced. To begin with, operator liability under the actual control standard is not, in fact, "unlimited". Furthermore, any deterrent effect on the acquisition of contaminated property stems from section 107(a)(1) of CERCLA, which imposes strict liability on current owners and operators of contaminated sites, not from the construction of the term operator under section 107(a)(2) adopted by the district court. Any such deterrent effect would be felt by all prospective owners and operators, not just parent corporations and is entirely distinct from the issue of CPC's operator liability under section 107(a)(2).

The Court of Appeals' criticisms of the district court's decision are unfounded and its decision is against the great weight of authority as evidenced by conflicting decisions in the First, Second, Third and Eleventh Circuits. *See: Certain Underwriters at Lloyds, London* (2d Cir.); *Schiavone* (2d Cir.); *Lansford-Coaldale Joint Water Authority* (3d Cir.); *Jacksonville Elec. Auth.* (11th Cir.); *John S. Boyd Co.* (1st Cir.). As applied

in *Donahey*, the standard also conflicts with decisions in the Second, Fifth and Eighth Circuits.

The Court of Appeals' decision contravenes the intent and purpose of CERCLA. By failing to give the words "owner" and operator their plain meaning, the Court of Appeals has impermissibly created a new standard, the contours of which are both vague and ambiguous. The decision allows a parent corporation that actually operates a hazardous waste facility to hide behind the corporate form even when the evidence presented establishes a level of participation and control that exceeds the bounds of an interested investor and enters the realm of an active operator. Under CERCLA, the term operator clearly encompasses a parent corporation such as CPC, who actively participated in and controlled the activities of its wholly-owned subsidiary at the facility.

CONCLUSION

For these reasons, Respondent, MDEQ, requests this Court to hold that a parent corporation may be held directly liable under CERCLA when the parent corporation has actively participated in, and exercised control over the activities of its subsidiary. Respondent further requests that this Court reverse the Court of Appeals and hold CPC directly liable as an operator under CERCLA.

Respectfully submitted,

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OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT BESTFOODS

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QUESTION PRESENTED

Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") imposes liability on any "person" who "operated" a "facility" that disposed improperly of hazardous substances. The question presented is:

Whether Congress, in providing that a corporation may be held liable under CERCLA as an "operator," intended to sweep aside longstanding principles governing the liability of parent corporations for the actions of their subsidiaries and to license the federal courts to develop *ad hoc* rules of corporate parent responsibility.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

On January 2, 1998, respondent CPC International Inc. changed its name to Bestfoods, following the spin-off of its corn-refining business into an independent company named Corn Products International, Inc. Corn Products International, Inc., is not at risk for any liability in this matter.

In addition to the parties listed in the caption, the respondents are Aerojet-General Corporation, Cordova Chemical Company of Michigan, Cordova Chemical Company, and the Michigan Department of Environmental Quality. The State agency formerly was known as the Michigan Department of Natural Resources. See No. 97-296 Pet. ii. For consistency with the proceedings in the courts below, we will refer to the State agency as "Michigan" or the "MDNR."

Respondent Bestfoods has no parent companies and has the following nonwholly owned subsidiaries:

Beigel & Beigel Mazon Ltd.
California Manufacturing Company, Ltd.
Corn Products Co. (India) Ltd.
CPC/AJI (Asia) Ltd.
CPC/AJI (Hong Kong) Ltd.
CPC/AJI (Malaysia) Sdn. Berhad
CPC/AJI (Singapore) Pte. Ltd
CPC/AJI (Taiwan) Ltd.
CPC/AJI (Thailand) Ltd.
CPC (Guangzhou) Foods Ltd.
CPC (Shanghai) Foods Ltd.
CPC Foods a.s.
CPC Foods Co., Ltd., Beijing
CPC France S.A.
CPC Middle East Holdings B.V.
CPC Monda N.V.-S.A.
CPC Tongaat Foods (Proprietary) Limited
Israel Edible Products Ltd. "TAMI"
Knorr Alimentaria S.A.
Maghreb Alimentation S.A.
P.T. Knorr Indonesia

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BRIEF FOR RESPONDENT BESTFOODS

STATUTORY PROVISION INVOLVED

In addition to the statutes appended to the Brief of the United States, the following statutory definition is relevant. In pertinent part, Section 9601(9) of Title 42 provides:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer * * *), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located * * *.

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), imposes liability on "any person" who "operated" a "facility" where "hazardous substances were disposed of." The United States asserts that, in using the word "operated," Congress intended not only to hold liable the immediate operator of a facility, but also *sub silentio* to prescribe new federal rules for determining when parent corporations are liable for the actions of their subsidiaries. This Court only recently rejected, by unanimous vote, a similar attempt by the government to seize upon congressional silence to push aside fundamental but inconvenient doctrines of state law in order to minimize the government's burden of proof under a comprehensive federal regulatory scheme. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). The same result is warranted here.

A. Statutory Setting

This case involves the allocation of liability under CERCLA for the cleanup of a site near Muskegon, Michigan. CERCLA "seeks to facilitate government cleanup of hazardous waste discharges and prevention of future releases." *Exxon*

Corp. v. *Hunt*, 475 U.S. 355, 359-360 (1986). To that end, CERCLA required the federal government to implement a "national hazardous substance response plan," including a "National Priorities List" of sites most warranting attention, and created a "Superfund" to pay for cleaning up the most dangerous sites. 42 U.S.C. §§ 9605(a), (c); *id.* § 9611. CERCLA also created a comprehensive system of private obligations and liabilities. These provisions have been interpreted to impose retroactive liability on certain defined persons deemed responsible for the past — often, long-past — disposal of hazardous substances.

Like other provisions of CERCLA, those at issue in this case are "not * * * model[s] of legislative draftsmanship" and are "at best inartful and at worst redundant." *Exxon*, 475 U.S. at 363. CERCLA rendered liable for various costs of remediating contaminated facilities both the current "owner and operator of a * * * facility" and "any person who at the time of disposal of any hazardous substance owned or operated any facility." 42 U.S.C. § 9607(a)(1), (2).

The meaning of "facility" is clear enough: "any building, structure, * * * well, pit, pond, lagoon," or other "site or area where a hazardous substance has been deposited, stored, disposed of * * * or otherwise come to be located." 42 U.S.C. § 9601(9). For most facilities, however, CERCLA provides only a circular definition of "owner or operator": "any person owning or operating such facility." *Id.* § 9601(20)(A)(ii). In the case of abandoned facilities to which a State or local government has obtained title, the definition is expanded to include not only those who "owned" or "operated" the facility, but also any person who "otherwise controlled activities at such facility immediately before[]" the abandonment. *Id.* § 9601(20)(A)(iii). Excluded from the definition are persons who "hold[] indicia of ownership" — and thus otherwise would be "owners" — "primarily to protect [a] security interest in the * * * facility" but do not "participat[e] in the management of a * * * facility." *Id.* § 9601(20)(A).

B. Factual Background

Four separate successive owners manufactured chemicals at the Muskegon site: Ott Chemical Co. ("Ott I"), from 1957 to 1965; Ott Chemical Co. ("Ott II"), a wholly owned subsidiary of respondent Bestfoods (formerly CPC International Inc., and designated "CPC" here) from 1965 to 1972; Story Chemical Co., from 1972 until it went bankrupt in 1977; and two wholly owned subsidiaries of respondent Aerojet-General Corp. — Cordova Chemical Co. ("Cordova/California") and Cordova Chemical Co. of Michigan ("Cordova/Michigan") — from 1977 to 1986. Pet. App. 3a-5a.

1. Ott I manufactured a variety of synthetic organic chemicals at the Muskegon plant. See Pet. App. 63a. Arnold Ott, who founded the company and served as its president, and James Eiszner, vice-president of marketing, were among the company's top executives. See *id.* at 64a.

In 1963, Alexander MacFarlane joined the Ott I board. Pet. App. 64a. MacFarlane was chairman of CPC (then known as Corn Products Company), which specialized in wet-milled corn products. Two years later, a subsidiary of CPC purchased the assets of Ott I and then adopted the Ott name. *Id.* at 65a. In negotiating the asset sale, Ott I and CPC agreed that the Ott I management team would continue to direct the business of the new corporation, Ott II. C.A. App. 2906-2907, 3376-3380.

Ott II continued Ott I's operations at the Muskegon site (Pet. App. 66a); later, it also operated a chemical manufacturing plant in Charlotte, North Carolina. *E.g.*, C.A. App. 2329, 2334, 2340-2343. As the district court found, "[t]he officers of Ott II remained identical to the officers of Ott I[.] * * * Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility." Pet. App. 66a.

In addition, the Ott II board of directors was "an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner." Pet. App. 67a. In particular, "[t]he board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal." *Ibid.*

Ott and Eiszner assumed duties for CPC while retaining their positions with Ott II. Pet. App. 68a. Ott continued as president of Ott II through 1966 and was its CEO and chairman of the board through 1969. *Id.* at 68a, 70a, 72a. Ott remained on the Ott II board after he resigned from CPC in 1969 (C.A. App. 731) and continued to advise his successors in management — actions that the district court attributed to his former employer, CPC. See Pet. App. 73a.

2. CPC's acquisition of Ott I was a typical 1960s conglomerate acquisition. CPC acquired several companies in businesses that were unrelated to CPC's core businesses, wet-milled corn products and branded consumer foods. The acquired companies were loosely federated within the Corn Products Development Company ("CP Development"), a division of the parent corporation. Pet. App. 70a. CP Development oversaw six CPC subsidiaries (including Ott II) and a research center. C.A. App. 3325-3326, 3331-3332, 3419-3420. CP Development reviewed Ott II's financial performance, projections, and large capital expenditure requests. Pet. App. 72a-73a. Like any substantial investor, CP Development "exert[ed] pressure [on Ott II] to generate more profits and enhance performance." *Id.* at 72a.

Unsurprisingly, some officers of Ott II, including Ott and Eiszner (who succeeded Ott as president of Ott II), held positions in the division that oversaw Ott II and the other separate subsidiaries; Ott was the first president of CP Development. Pet. App. 72a. Eiszner's successor as president of Ott II, Beverly Warner, moved in the other direction, from president of CP Development to CEO of Ott II. *Ibid.* There was

no evidence, however, that CP Development and Ott II were in any sense an integrated enterprise.

3. Like virtually all parent corporations, CPC put some employees on its subsidiary's board of directors. Pet. App. 67a-68a. If Ott I carryover officers Ott and Eiszner are counted as CPC representatives, CPC employees at times made up a majority of the Ott II board. *Ibid.*; see C.A. App. 736-737. Only one of the CPC officers who served on Ott II's board was also a director of CPC (*id.* at 731-732, 736-737), however, and there was no evidence that CPC used its relationship as employer of some Ott II directors to control Ott II's corporate policy. To the contrary, as Ott II board minutes attest, CPC chairman MacFarlane made clear to the Ott II board members that CPC did "not want[ ] to 'meddle' with" Ott II. C.A. App. 2210.

Actual practice accorded with this policy. As the district court found, Ott II corporate officers set the day-to-day operating policies for the company without any supervision or approval by CPC: "[t]he Ott II management formulated and implemented the company's day-to-day operating policies" across the whole range of activities, "including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and," significantly for present purposes, "environmental matters." Pet. App. 69a. Until 1970, those officers included *no* CPC employees not drawn from Ott I; indeed, at no time did more than two Ott II officers (out of nine) simultaneously hold positions with CPC. C.A. App. 738-740. Ott II did not routinely report its decisions to CPC personnel, much less seek their approval, except for the few large capital expenditures that CP Development was required to review. C.A. App. 2877, 3555-3560.

On a day-to-day basis, Ott II conducted its own business. Ott II hired and fired its own employees without consulting CPC. *E.g.*, C.A. App. 2908-2909, 3531-3532. Ott II had its own research and marketing staff; Ott II's officers and directors decided the type and volume of chemicals that Ott II produced.

Id. at 2365, 2918-2919. In addition, as the parties stipulated, Ott II maintained its own general and payroll bank accounts; its accounting and financial records were separate from CPC's, and were separately audited. *Id.* at 741-742, 3456-3458.

CPC did provide some incidental administrative and legal services over the years. Ott II obtained insurance, pension benefits, and tax and accounting advice through CPC, and was charged for the fair value of its share of those services on the inter-company accounts. C.A. App. 3199-3200, 3459. Ott II's general counsel did not come from CPC; indeed, Eiszner, as Ott II's president, successfully resisted the efforts of CPC's legal department to select Ott II's labor counsel. C.A. App. 1921, 2899, 3036-3037. When a union that also represented CPC employees sent in national-level negotiators to bargain with Ott II, however, CPC's labor negotiators assisted Ott II's counsel, but Ott II controlled the negotiating pertaining to its employees and made the final decisions regarding the labor agreement. C.A. App. 2897-2900, 3452-3455, 3540.

4. Upon beginning operations in 1957, Ott I obtained a permit from the Michigan Water Resources Commission ("MWRC") allowing it to discharge the wastewater from its manufacturing process into unlined seepage lagoons on the Muskegon property. C.A. App. 727; see Pet. App. 60a-61a. In 1965, several months before the sale to CPC, Ott I retained a consulting firm to propose possible solutions to wastewater supply and disposal problems and began a three-year process of negotiating with the MWRC about the appropriate change in disposal methods. C.A. App. 1805, 3389-3391.

Ott II continued those efforts. C.A. App. 1931, 1972, 1996. Ott II developed a long term waste disposal plan in 1966 and implemented the plan the following year. Although the Ott II board could not spend the full $375,000 on the plan until the CPC board approved that large expenditure, Ott II began implementing the plan without waiting for final approval. C.A. App. 734, 2184, 2190, 2194, 2801.

Ott II improved the waste disposal system in several ways. For example, it added and then redeveloped purge wells to confine and remove contaminated ground water, and it built an in-plant waste collection system and an equalization basin. C.A. App. 2228-2234. Ott II's state-of-the-art efforts to control its waste disposal were the subject of a technical journal article that concluded that the new system "achieved the goal of preserving the environment." Burt, *The Use, Abuse and Recovery of a Glacial Aquifer*, GROUND WATER, Jan.-Feb. 1972, at 65, 65. The new system went into operation in March 1968. C.A. App. 2232; see Pet. App. 60a.[1]

CPC was not involved in the design or implementation of these projects, which entailed close work with the consultants and a series of meetings with the MWRC. *E.g.*, C.A. App. 1953-1954, 2026-2027, 2031, 2045, 2145-2147; Exs. 91, 197, 255. In the year between September 1965 and September 1966, when Ott II was developing its new waste management plan with its consultants and was negotiating with the MWRC, no evidence reflects any communication from CPC to Ott II's employees or officers regarding waste disposal. C.A. App. 2868-2891, 2929-2933, 2936, 3392-3393, 3242-3248.

5. After CPC had agreed in principle on December 31, 1971, to sell Ott II to Story, CP Development essentially acted as Story's agent in overseeing Ott II. Pet. App. 72a, 74a. Although the day-to-day internal management of Ott II was unchanged (C.A. App. 3356), Ott II managers were "advised not to implement any changes in activity" without consulting

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[1] The district court asserted (Pet. App. 61a) that "hundreds of drums" were buried in an area of the Muskegon site. The government's post-trial investigation confirmed that the testimony to that effect was inaccurate. Extensive pretrial excavations in the area had uncovered only ten drums, filled mainly with empty glass bottles. Tr. 45-46, 1768, 1770-1772, 2564-2565, 2593-2594; Ex. 1327, at 3; Ex. 2338, at 83. After trial, EPA asked the witnesses who had made the dramatic allegations to pinpoint the area where the drums had been buried. They identified the same area investigated previously; further investigation uncovered no additional drums. See Proposed Trial Ex. 2443, CPC Motion to Amend the Court's Findings of Fact (Apr. 29, 1992).

CPC (Pet. App. 74a) so as to prevent the dissipation of assets for which Story had agreed to pay a set price (C.A. App. 3355); CPC had "undertaken" to perform such monitoring in its "sale agreement with Story." Knief Dep. 102.

CPC had reason to be concerned about ensuring that the business it conveyed to Story was in as good shape as had been portrayed. While negotiating with Story, CPC discovered that Ott II's profits had dipped substantially. C.A. App. 2349, 3344; Tr. 1436-1441. This discovery — the belated nature of which underscores the separation between CPC and Ott II — prompted CPC to direct Ott II management to avoid any further changes that might jeopardize the sale to Story. *Ibid.*

Story acquired Ott II in 1972 (Pet. App. 78a); nothing in the record indicates that any debts or other liabilities of Ott II remained unpaid at that time. See C.A. App. 2353. Within two years, Story ceased using the purge well system regularly, accelerating the contamination of the property. Pet. App. 78a.

The Michigan Department of Natural Resources (MDNR) turned its attention to the Muskegon site after Story's bankruptcy in 1977. Pet. App. 79a. MDNR sought a buyer for the Muskegon site that could contribute to the cleanup process. *Id.* at 81a. Aerojet, which sought a facility to make a chemical for its Cordova Chemical Company division, negotiated with MDNR and the bankruptcy trustee. *Id.* at 81a-82a. Aerojet incorporated the Cordova division as Cordova/California in October 1977; Cordova/California purchased Story's assets shortly thereafter, entering into a side agreement with MDNR. *Id.* at 82a-83a. Cordova/California incorporated Cordova/Michigan as a subsidiary in 1978, and transferred the Muskegon plant to the subsidiary. *Id.* at 94a. MDNR took responsibility for purging the groundwater and received appropriations for that purpose. Pet. App. 83a-91a; C.A. App. 2567, 2574. But MDNR never operated the purge wells. C.A. App. 766.

In 1982, EPA listed the Muskegon site on the National Priorities List. U.S. Br. 10. Although the government now describes the site as "acutely hazardous" (Br. 7), it did not

undertake any groundwater remediation there for 14 years; soil remediation, if any is necessary, has not yet begun.

C. Proceedings Below

1. In 1989, 17 years after CPC sold the Ott II assets, several CERCLA claims, counterclaims, and cross-claims were raised in a consolidated action in the United States District Court for the Western District of Michigan. In 1991, the district court held CPC, Aerojet, Cordova/California, and Cordova/Michigan jointly and severally liable for cleanup costs at the Muskegon site. Pet. App. 128a-129a.

Contrary to the government's assertion (Br. 11), the trial did not focus in any way on whether CPC actually operated the *Muskegon facility*. As the Sixth Circuit recognized (Pet. App. 18a), the government did not try to link CPC in any direct or immediate fashion to the "operation" of any "facility" at the Muskegon plant where waste had been deposited and needed to be cleaned up. Rather, the government and MDNR (along with Aerojet, their ally in the district court on the question presented here), tried the case on the theory that CPC "operated" *Ott II* through its influence at the highest levels of management.[2] Indeed, the government did not even ask the district court to find that CPC had "operated" the Muskegon "facility," relying instead on the broad assertion that "CPC participated in the management of the *activities of Ott II* and exercised control *over its subsidiary* and thus was an operator of the Site." U.S. & MDNR Proposed Findings of Fact and Conclusions of Law 9 (June 18, 1991) (emphasis added).

The district court held that CPC was liable as an "operator" of the Muskegon facility. In the district court's view, "section 107(a)(2) liability may attach to a parent corporation in two ways": direct liability, or liability through common law veil-

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[2] Aerojet advocated a broad rule of parent corporation "operator" liability in order to force CPC to share liability. Aerojet and its subsidiaries apparently are near (and now may have reached) a settlement agreement with the government and MDNR. See No. 97-296, U.S. Br. 9 n.4.

piercing. Pet. App. 103a-104a. The court concluded that the statutory term "operated" somehow "forge[d] a new, middle ground" of supposed "direct" liability (*id.* at 107a) — a "middle ground" that did not accord the full protection of the corporate form to any but the most passive parent corporations.

The district court defined its "new, middle ground" in these terms: "a parent corporation is directly liable under section 107(a)(2) as an operator" whenever "it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." Pet. App. 107a. Applying that test to "all the facts regarding CPC's *involvement with Ott II*" (*id.* at 110a (emphasis added)) — *not* to CPC's involvement with the day-to-day operations *of the Muskegon "facility"* — the court found CPC liable based on "active participation and control by CPC in Ott II affairs." *Id.* at 111a.[3]

The district court acknowledged that its decision was *ad hoc*: "In the final analysis, each case must be decided on its own unique facts and circumstances." Pet. App. 108a. The court focused on the presence of persons with ties to CPC in Ott II's upper management (principally, Ott and Eiszner), rather than on any CPC corporate involvement in manufacturing operations or waste disposal at the Muskegon facility. Pet. App. 65a-78a, 110a-112a. The court assumed that any officer or director of Ott II who also held a position at CPC performed his Ott II duties not as an agent of Ott II but as an agent of CPC. The court also noted that CPC had contributed cash to Ott II's expansion, had to approve large expenditures by Ott II, and on occasion had shared administrative and legal resources with Ott II (see *id.* at 76a-77a) — although in the same breath the court claimed that "monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the

[3] In light of this conclusion, the district court did "not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing" (Pet. App. 112a).

subsidiary and the parent in research" were *not* activities that would normally support liability. *Id.* at 108a.

In addition, the district court identified three ways in which CPC "actively participated in Ott II environmental matters." Pet. App. 74a. First, as noted above, the court attributed to CPC as an entity all discussions about waste disposal by the Ott II board and management, because some Ott II officers and directors also held positions with CPC. Second, the court rested heavily on the participation of a CPC employee, G.R.D. Williams, in internal Ott II discussions and in a meeting with the MWRC involving Ott II environmental matters. Third, the court noted that a CPC attorney negotiated the use of a county wastewater treatment system for Ott II. *Id.* at 74a-76a.

Finally, the district court held that Aerojet was separately liable as the "present owner" of the facility, finding a basis under Michigan law to pierce Aerojet's corporate veil and charge the parent with the obligations of Cordova/Michigan, which owns the Muskegon site. Pet. App. 120a-122a; see 42 U.S.C. § 9607(a)(1).The court also held that Aerojet was liable as an "operator" of the Muskegon facility, concluding that "Aerojet's participation and control over * * * Cordova/California and Cordova/Michigan shows that the parent operated the facility." Pet. App. 124a.

2. The Sixth Circuit, sitting *en banc*, reversed the judgments holding CPC and Aerojet liable as "operators." Pet. App. 1a-24a. Unlike the district court, the court of appeals did not believe that "operator" liability could be imposed on a parent corporation based solely on an *ad hoc* analysis of "the degree of control exerted by the parent over its subsidiary." *Id.* at 18a. Certainly, "the degree to which [a parent] controls its subsidiary and the extent and manner of its involvement with the facility" could render a parent liable as an operator of a facility operated by its subsidiary. *Id.* at 15a. But the Sixth Circuit did not find anything in the definition of "operator" — "any person * * * operating such facility" — or elsewhere in CERCLA that "warrants the invocation by courts of vague, expansive

concepts, such as the district court's 'new, middle ground,' which threaten the efficacy of time-honored limited liability protections afforded by the corporate form." *Id.* at 13a-14a.

Accordingly, the Sixth Circuit held that a parent may be liable under Section 107(a)(2) only (a) "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" or (b) "by piercing the corporate veil" under state law (Pet. App. 17a; see *id.* at 15a). The court of appeals recognized that the first theory was "not * * * relied upon by the district court" and was "not supported by the facts in the record" in any event. Pet. App. 18a. Applying the veil-piercing standard, the court of appeals held that there was no support in the record for imposing "operator" liability on either CPC (*id.* at 16a-18a) or Aerojet (*id.* at 22a). With respect to CPC, the court of appeals noted that the factors on which the district court relied revealed only "a parent that took an active interest in the affairs of its subsidiary"; CPC's behavior towards its subsidiary did not "indicate such a degree of control that the separate personalities of the two corporations ceased to exist" or that CPC used "the corporate form to perpetrate the kind of fraud or other culpable conduct required before a court can pierce the veil." *Id.* at 17a.

SUMMARY OF ARGUMENT

The government's construction of "operated" in 42 U.S.C. § 9607(a)(2) suffers from two fatal flaws. First, it strains the normal definition of a commonplace word for no purpose other than to ease the government's burden of proving liability. Second. it creates from whole cloth a federal standard to displace well-developed doctrines of state common law. There is no evidence that Congress intended courts, in applying CERCLA, to devise *ad hoc* federal rules for determining when the activities — here, the waste disposal — of a corporate subsidiary may be ascribed to its parent.

Under the ordinary understanding of the term "operator," CPC's subsidiary Ott II was the "person" that "operated" the

Muskegon "facility" from 1965 to 1972, and the district court so found. Pet. App. 59a. The Muskegon site was used exclusively during that period to produce chemicals sold by Ott II. Nothing in the language or legislative history of CERCLA suggests an intent to extend liability beyond those persons immediately "operating" a "facility" to reach persons who in some way controlled or participated in managing a separate corporate "person" that in turn operated the facility. Indeed, the structure of CERCLA affirmatively excludes the "participation" and "control" gloss that the government would lay on the word "operator." Other provisions of CERCLA use those criteria to alter the core definition of "owner or operator," but Congress limited the applicability of those criteria to narrow circumstances not presented here. Moreover, Congress has repeatedly demonstrated its ability to incorporate concepts of "control" into a statutory basis of liability, but it did not do so here.

Nonetheless, the government asserts that CPC also "operated" Ott II's facility, because CPC participated in the affairs of Ott II. There is more than a century of well-developed law that determines when a corporation may be said to have acted through a subsidiary corporation that was the immediate actor. Although Congress quite clearly intended corporations to be separate "person[s]" subject to CERCLA liability (42 U.S.C. § 9601(21)), nowhere did it manifest an intent to supplant the firmly established rules of corporate parent responsibility.

The government denies that any corporate entity question exists. The cornerstone of its argument, however, is that because some officers and directors of Ott II held positions with CPC, all of Ott II's conduct may be attributed to its parent. That contention necessarily assumes away a question of corporate entity law that the common law resolves in a contrary manner. Thus, the government's purported "plain language" argument rests on an unstated assumption that a new federal common law of the corporate entity has silently taken effect.

Once that fallacious presumption is cast aside — as it must be under *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994) —

no plausible basis for "direct" operator liability remains, as the Sixth Circuit correctly found. Pet. App. 17a-18a. Contrary to the government's submission, CERCLA provides no basis for federal courts to create a specialized federal common law of corporations in order to provide a "new, middle ground" of liability for parent corporations of corporate "operators."

To make matters worse, the government does not bother to set forth any discernible and predictable legal rule to guide the courts in applying its "active participation and control" test, but simply declares open season on parent corporations that follow the common practice of exercising control over their subsidiaries. Exposing almost all parent corporations to a risk of liability under CERCLA would have severe adverse consequences — consequences that this Court should hesitate to impose without a strong showing that Congress desired that result.

It is, of course, the law of the states that actually determines when a corporate parent's actions with respect to a subsidiary may render the parent liable for the subsidiary's conduct. The Sixth Circuit held, and the government does not dispute, that CPC had not so involved itself in Ott II's affairs to render itself liable for Ott II's operations under Michigan law. The judgment therefore should be affirmed.

ARGUMENT

CONGRESS'S USE OF THE WORD "OPERATOR" IN CERCLA WAS NOT INTENDED TO CREATE A NEW FEDERAL RULE FOR DETERMINING WHEN A PARENT CORPORATION IS RESPONSIBLE FOR THE ACTIONS OF ITS SUBSIDIARY

In seeking to hold CPC liable under CERCLA for any disposal of hazardous substances that occurred at the Muskegon facility operated by Ott II, the government relies (as did the district court) on a "new, middle ground" of liability (Pet. App. 107a) that greatly expands the traditional responsibility of a parent corporation for the operations of its subsidiary. In the government's view, by rendering "operators" liable for waste

disposal at a "facility," Congress silently discarded more than a century of state common law jurisprudence determining when the actions of a corporate subsidiary may be attributed to its parent and authorized federal courts to create a new standard "of federal corporate law from whole cloth." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) (quoting *Burks* v. *Lasker*, 441 U.S. 471, 480 (1979)). The government's position is insupportable and should be rejected.

A. In Its Statutory Context, "Operator" Signifies The "Person" Who Conducts The Activities Resulting In Disposal At A Covered "Facility" Whether Or Not That Person Owns The Facility

As in all matters of statutory interpretation, the starting place here is "the language of the statute." *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995). The statutory definition of "operator" — "any person * * * operating [a] facility" (42 U.S.C. § 9601(20)(A)) — is "completely circular and explains nothing." *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 323 (1992). Accordingly, the word "operator" must be given "its ordinary or natural meaning," considered in light not only of "the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey*, 116 S. Ct. at 506 (internal quotation marks omitted).

As it did in *Bailey*, the government offers a sweeping and unnatural gloss on a commonplace term. This time, the government defines "operator" not only to encompass the corporation that immediately operates a facility but also to include (under an amorphous federal common law test) any "person" that controls that corporation. The government contends (Br. 37-38), without support, that Congress imposed liability on "operators" as well as "owners" precisely to hold parent corporations liable when their subsidiaries owned and directly operated waste sites. But the word "operator" cannot bear that freight. Congress in enacting CERCLA did not evidence the slightest intent to alter settled state law governing when the acts of one corporation may be said to be those of another.

1. *The Plain Meaning Of "Operator" Does Not Support The Government's View*

a. The everyday sense of "operator," when contrasted with the word "owner," is simpler and more restricted than the government claims. The "operator" is the person that directly runs a machine, a business, or (as here) a disposal "facility," but does not necessarily own the equipment being operated or the real estate where the operations take place. The district court understood the word in that way, stating at the outset of its opinion that the Muskegon "site was owned and operated by * * * Ott Chemical Company ('Ott II')." Pet. App. 59a. Many businesses operate facilities they do not own, and many businesses own facilities they do not operate. CERCLA's liability scheme simply ensures that, where a facility's owner was not the same person as its operator, both would be answerable for clean-up costs. Contrary to the government's contention (Br. 37, 38), "operator" liability does not speak at all to the liability of parent corporations or other shareholders of "operators."

The Act to Prevent Pollution From Ships, enacted six weeks before CERCLA, provides insight into the meaning that the CERCLA Congress assigned to the common terms "owner" and "operator." That statute separately defined "owner" and "operator," clarifying that "operator" simply covered "any * * * person, except the owner, * * * responsible for the operation" of a ship or terminal. 33 U.S.C. § 1901(a)(7).

Many other statutes reflect the same unadorned understanding of an "operator." State motor vehicle laws commonly refer to both "owners" and "operators" in imposing obligations on both the owner of a vehicle as well as the person actually driving it.[4] The same idea underlies the use of "owner" with "operator" to hold liable both a shipowner and the person or

[4] See, *e.g.*, *State Farm Mutual Automobile Insurance Co.* v. *Coughran*, 303 U.S. 485, 488 (1938) (quoting typical statute defining operator as one who "drives, operates, or is in actual physical control of a motor vehicle").

company directly in charge of the vessel, as in CERCLA itself.[5] Mining laws provide another typical context in which the owner of the mined land (or of the mining claim) often is not the person conducting mining operations, yet both are legally responsible for activities at the mine.[6] Other federal statutes likewise use "operator" or "operates" in the same way to identify a non-owner who is the immediate, on-site person or entity conducting the relevant activities at a facility.[7]

This Court has used "operator" in the same, everyday sense, especially when that word appears in conjunction with "owner." This Term, the Court noted that the respondents in *State Oil Co.* v. *Khan*, 118 S. Ct. 275, 278 (1997), "lease[d] and operate[d] a gas station and convenience store owned by State Oil."[8] The Court earlier explained that certain companies that "owned and operated" railroads also "owned and worked" their own coal lands, while others "not only owned, but also leased and operated" coal mines. *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 392-393 & n.† (1909). In these and other usages the Court has not

[5] See 42 U.S.C. § 9601(20)(A)(i); see also 33 U.S.C. §§ 409, 414(b) (duties and liabilities of "owner, lessee, or operator" of sunken vessels).

[6] *E.g.*, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 533 (1914) (quoting state mining law defining "operator" as the "immediate proprietor or lessee or occupier"). See 10 OXFORD ENGLISH DICTIONARY 851 (2d ed. 1989) (citing 1881 mining glossary that defines an "operator" as "[T]he person, whether proprietor or lessee, actually operating a mine or colliery").

[7] See, *e.g.*, 7 U.S.C. §§ 1922(a), 1941(a) (operators of family farms); 26 U.S.C. § 3121(g)(2) ("the owner or tenant or other operator of a farm"); 29 U.S.C. § 213(c)(1)(A) (child employed "on a farm owned or operated by [his] parent"); 35 U.S.C. § 202(c)(7) ("Government-owned-contractor-operated facility"); 40 U.S.C. § 481(b)(2)(B) ("federally owned and contractor operated * * * facilities").

[8] A 1986 amendment to CERCLA uses "owns or operates" in exactly this sense. See 42 U.S.C. § 9601(37) (defining "service station dealer" as any person "who owns or operates a motor vehicle service station").

suggested that the term "operator" applied to anyone other than the legal entity actually engaged in the operations at issue.[9]

b. Other terms in CERCLA reinforce this commonsense meaning of "operator" as opposed to a meaning directed at the liability of parent corporations (see U.S. Br. 37-38). In particular, CERCLA ties "operating" closely to the "facility" for which remediation is sought, *i.e.*, the structure, lagoon, or other area where hazardous substances were released. See 42 U.S.C. §§ 9607(a)(2), 9601(9). The proper meaning of "operator" relates to this specific, concrete statutory context. Compare *Bailey*, 116 S. Ct. at 505 (limiting "use" of a gun in relation to drug crimes to "active employment of the firearm" by the defendant) with *Astor* v. *Merritt*, 111 U.S. 202, 213-215 (1884) (for purposes of customs laws, "actual use" of apparel not limited to clothing already worn).[10]

The only "operating" that matters, therefore, is the actual physical "operating" of the "facility" where hazardous substances were placed, not the "operating" of a subsidiary through its officers and directors.[11] Although the district court plainly

[9] *E.g.*, *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board of Mississippi*, 474 U.S. 409, 412, 426 (1986) (owners, including "nonoperator owners," and operators of natural gas wells); *Shepard* v. *NLRB*, 459 U.S. 344, 345 (1983) (petitioner "owns a dump truck, and operates it" to haul materials to construction sites); *United States* v. *Swank*, 451 U.S. 571, 573 (1981) ("[e]ach taxpayer operated a coal mine pursuant to a written lease").

[10] The immediate sense of "operating" a "facility" is consistent with the statutory assumption that, in the run of cases, there would be only one "owner" and one "operator" of a "facility" at any given time. The most prominent example is the provision imposing liability on "*the* owner and operator of a * * * facility." 42 U.S.C. § 9607(a)(1) (emphasis added). See also, *e.g.*, *id.* § 9611(g) (duty of "the owner and operator" to notify public of release of any hazardous substance); *id.* § 9612(a) (requiring presentation of claims to "the owner, operator, or guarantor" of a facility). Under the government's theory, there frequently would be simultaneous operators of the same facility.

[11] The dictionary definitions on which the government relies (Br. 20-21) confirm a limited and concrete sense of the terms "operate" and "operator" — the person that "works" or "manages" a business or, as here, a "facility"

overlooked this distinction, and the government repeatedly tries to blur it, this Court long ago distinguished between *operating* a subsidiary's *facility*, in that case a railroad, and *controlling* the subsidiary *company*. After noting that the parent held virtually all of the subsidiary's stock, and that the same individuals held positions as directors and management officials within the two companies, the Court nonetheless concluded that the separately incorporated subsidiary "operate[d] its own road." *Pullman's Palace Car Co.* v. *Missouri Pacific Ry.*, 115 U.S. 587, 589, 596 (1885). Although "[p]ractically [the parent] may control the [subsidiary] company, * * * the [subsidiary] alone controls its road." *Id.* at 597.[12] *That* meaning of "operates" — "in * * * immediate control of" (*ibid.*) a facility covered by CERCLA — accords both with common sense and with precedent.

Contrary to the impression fostered by the government (Br. 11, 18, 45), the district court did *not* rest CPC's liability on any purported involvement in the day-to-day operations of the "facility," *i.e.*, the areas where hazardous substances were put. Rather, at the government's urging, the district court concentrated on whether CPC had somehow "operated" its *subsidiary*, which, the court recognized, was fully responsible for day-to-day operations at the Muskegon plant. Pet. App. 69a. The district court relied on "all the facts regarding CPC's *involvement with Ott II*" (*id.* at 110a (emphasis added)), and held CPC liable not for operating the Muskegon facility but for allegedly "operating" Ott II by "permeat[ing] the board, management and

within a business operation. Those definitions therefore weigh against the government's argument for an abstract and intermediated meaning of "operator." See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1581 (1986) (defining "operator as "one that engages himself in the mechanical aspect of any process or activity").

[12] Compare *Costan* v. *Manila Electric Co.*, 24 F.2d 383, 385 (2d Cir. 1928) (parent "was actually operating the railway of its subsidiaries" where parent, without action by subsidiaries' boards of directors, contracted with management company to hire personnel and purchase supplies necessary to run railway, subject to supervision only of parent's board of directors).

decision making of a wholly owned subsidiary" (*id.* at 111a-112a) — a conclusion that itself was unsustainable. Indeed, the government describes (Br. 41) its own analysis as addressing a stockholder's involvement in the "operation of a *subsidiary*" first and of a "facility" second, if at all.

In effect, the government asks the Court to rewrite CERCLA to impose liability upon a person that "operates" another legally separate person that in turn operates a "facility." But this Court prefers statutory constructions that rely on the "normal and usual meaning" of words rather than those that strain a simple word to cover a complex "two-stage" process. See *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514-516 (1963).

c. For similar reasons, there is no merit to the suggestion (U.S. Br. 19; Mich. Br. 8-9) that Congress silently abrogated the usual protections of the corporate form by including corporations among the "persons" that may be "operators" under CERCLA. See 42 U.S.C. § 9601(21). That inclusion simply makes clear that entities such as Ott II may be liable as operators. Terms with "settled meaning[s] under . . . the common law" are presumed to "incorporate the established meaning," *Darden*, 503 U.S. at 322, but "[t]he term 'corporation' does not include stockholders" such as a separate parent corporation, "and a statute imposing a liability upon the corporation does not thereby impose the same upon the stockholders." *Park Bank* v. *Remsen*, 158 U.S. 337, 346 (1895).

Congress easily could have specified "parent corporation of any person" or "shareholder of any person" in the definition if it wanted to go beyond the usual scope of corporate liability, but it did not. As this Court held of an earlier Congress's omission of any reference to subsidiary corporations, "the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it." *Delaware & Hudson*, 213 U.S. at 414. Congress's silence leaves state law to supply the scope of corporate liability, just as state law defines the status of a corporation and the other entities identified as "person[s]." See *Darden*, 503

U.S. at 322; *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 89 (1987) ("existence and attributes" of corporations "are a product of state law").

2. *The "Participation And Control" Test Engrafts Onto The Definition Of "Operator" Two Criteria That The Language And Structure Of The Statute Exclude*

The statutory definition of "owner or operator" is purely circular: "any person owning or operating such facility," no more, no less. 42 U.S.C. § 9601(20)(A)(ii). "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 335 (1994) (internal quotation marks omitted). The government turns this settled rule on its head by insisting that parent liability should be assessed using elements of two adjacent definitions — "participation in the management" and "control" — that *alter* the core meaning of "owner or operator" applicable to this case.

To support its claim that "operating" is equivalent to any form of "control," the government relies (Br. 26-28) on a definition that applies only when a governmental authority has come into possession of a facility through *abandonment* or other default. 42 U.S.C. § 9601(20)(A)(iii). In that instance, to be sure, the statute imposes liability on "any person who * * * operated[ ] or *otherwise* controlled activities" at the facility immediately before abandoning it.[13] *Ibid.* (emphasis added). But that *expansion* of the scope of liable persons, designed to discourage (or, at least, to punish) abandonment of disposal sites, shows only that to be an "operator" requires "something more" (*Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358 (1993)) than abstract "control" — otherwise, there would have been no need

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[13] The government offers no support for its speculation (Br. 27) that "Congress recognized that such facilities were likely to be non-operational for some time prior to their abandonment," nor does it explain why, even in that case — if "control" truly amounts to "operation" — Congress would not just have imposed liability on whoever "operated" the facility.

to add "otherwise controlled activities" to the definition.[14] The Sixth Circuit correctly understood that, by this juxtaposition, "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." Pet. App. 13a; see *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991).

The language of CERCLA also defeats the argument (U.S. Br. 22-25) that "participating in the management" of a subsidiary renders a parent corporation liable as an operator of the subsidiary's facility. That phrase, too, is part of a definition of "owner or operator" that does *not* apply to this case. The statute provides that a person who appears to be the legal owner of a facility (*i.e.*, "holds indicia of ownership"), but who actually holds only a security interest in the property "without participating in the management of a * * * facility," is not subject to liability. 42 U.S.C. § 9601(20)(A). Thus, Congress restricted liability for merely "participating in the management of a * * * facility" to persons who, but for the operation of the security interest exception, would be liable as owners. *Ibid.*[15]

The government cannot explain why parties like CPC, who do not hold any "indicia of ownership" pertaining to a covered "facility," should be held liable as *operators* because they do not meet a criterion for an irrelevant *exemption* from *owner* liability. Indeed, if "participating in the management" transformed someone into an "operator," the secured lender exception could have been written more simply: exempting any holder of a security interest "unless that person operates the vessel or facility." In view of the statute that Congress *did* enact, however, "[t]he only reasonable reading of the * * * term" *operator* again "calls for something more." *Nelson*, 507 U.S. at 358.

The government truly grasps at straws when it asserts (Br. 23-25) that the 1996 amendments that expand upon the exception from owner liability somehow shed light on the intent of the 1980 Congress in enacting the definition of "operator." To begin with, as this Court has "often observed, * * * the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota* v. *Yankton Sioux Tribe*, 118 S. Ct. 789, 803 (1998) (internal quotation marks omitted). Moreover, the recent amendment is irrelevant: by its terms it, too, applies only to persons who "hold[] indicia of ownership" in a facility, and thus does not affect the core definition of "operator" at issue here.[16]

In sum, it is illogical to derive the positive meaning of "operator" by combining an *exception* to an *exemption* from owner liability with a term that the statute *contrasts* with "operat[ing]." To paraphrase *Sun Oil* (371 U.S. at 515), "[t]here

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[14] The "otherwise controlled" language does not appear in the parallel provision of the Clean Water Act applying to abandoned facilities, 33 U.S.C. § 1321(a)(6)(C). The CERCLA Congress's insertion of that language to apply only to abandoned facilities could not have been inadvertent. By contrast, in the Black Lung Benefits Act, Congress *did* define operator broadly to incorporate "control" of other persons, extending the definition of mine "operator" to "any owner, lessee, or other person who operates, controls, or supervises a coal * * * mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d).

[15] This exception originally appeared in a separate definition of "owner." See H.R. 85, § 101(x), 96th Cong., in 2 SEN. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., LEGISLATIVE HISTORY OF [CERCLA] 1022 (Comm. Print 1983).

[16] In any event, under the standard set forth in the secured-lender amendments, CPC did not "participate in the management" of the Muskegon "facility." Tellingly, the amendments did not identify representation within an "operator's" board of directors or officers as a factor relevant to the inquiry. And CPC surely did not "undertake[] responsibility for [Ott II's] hazardous substance handling or disposal practices." 42 U.S.C. § 9601(20)(F)(ii)(I). In addition, sporadic advice or assistance given by CPC personnel to Ott II in environmental matters did not control "the day-to-day decisionmaking" for Ott II's "environmental compliance." Moreover, even *assuming away* the corporate entity by attributing all dual officers to CPC and not to Ott II, the CPC board and management never accounted for "substantially all of the operational functions" of Ott II — functions that include "facility or plant manager, operations manager, chief operating officer, or chief executive officer" — but rather occupied only one or two high management positions. *Id.* § 9601(20)(F)(ii)(II), (G)(v).

is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in [Section 9601(20)(A)(ii)] the same broad meaning of ['owner or operator'] which it explicitly provided by inclusion" in the very next sentences; "the reasonable inference is quite the contrary." The omission "strongly suggest[s] a deliberate decision." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818-819 (1994).

3. *Congress Has Explicitly Addressed Corporate Control And Affiliation When That Was Its Intent*

The government's attempt to use the meaning of "operator" to support an indistinct, trans-entity "control" analysis is particularly inappropriate in light of the many federal statutes that directly address the parent-subsidiary (or shareholder-corporation) relationship or use "control" as an explicit criterion for liability. Certainly, as the Sixth Circuit observed, "[i]f Congress wanted to extend liability to parent corporations" under CERCLA in a non-traditional way "it could have done so." Pet. App. 14a (quoting *Joslyn*, 893 F.2d at 83). But Congress overrode state law pertaining to corporate "common ownership or affiliation" or "legal form" only in a 1986 amendment that preempted state limitations on the formation of purchasing groups for pollution liability insurance. 42 U.S.C. § 9674(a)(5).

Congress has not been cryptic when it has wanted to impose some version of a "control" test as a replacement for the traditional standards governing the responsibility of a parent corporation for the acts of its subsidiary. For example, the Securities Exchange Act of 1934 puts the issue in these terms:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter * * * shall also be liable jointly and severally with and to the same extent as such controlled person.

15 U.S.C. § 78t(a). In terms contrasting with the narrower "owner or operator" language of CERCLA, Congress long ago closed the Panama Canal to any ship "owned, chartered, operated, or controlled" by a person violating the antitrust laws.

15 U.S.C. § 31. See also 45 U.S.C. § 702(14) (distinguishing assets "controlled by a railroad in reorganization" from those "owned, operated, or leased by a railroad in reorganization"). Several other federal statutes, unlike CERCLA, expressly assign liabilities or deny benefits to corporations based on their affiliation or common control with other companies.[17]

Indeed, in the specific context of owners or operators of hazardous waste facilities, Congress has used a "control" standard when it intended one: a tax provision relevant to the financing of a "qualified hazardous waste facility" specifically distinguishes between "the owner or operator of such facility" and "any related person * * * to such owner or operator" (26 U.S.C. § 142(h)(2)(A), (B)), defined as "members of the same controlled group of corporations" (*id.* § 144(a)(3)(B)). Against this backdrop, CERCLA's silence on the issue of control-person, parent-corporation, or shareholder liability "is most eloquent" and should be dispositive evidence that Congress did not intend, without saying so, to work "an important and controversial change in existing law" by altering the treatment of the corporate form. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

The government therefore is quite misguided in insisting (Br. 17) that "Congress is entitled to enact legislation that creates a federal liability standard that applies without regard to considerations of the corporate form." The relevant question relates not to Congress's *power*, but to Congress's *intent*. Congress certainly could have supplanted traditional corporate responsibility rules in enacting CERCLA, but there is absolutely no evidence that it meant to do so.

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[17] See, *e.g.*, 12 U.S.C. §§ 3201-3207 (regulating corporations "affiliated" with depository institutions); 26 U.S.C. § 1239(b)(1) (denying depreciation allowance to transactions between a person and "controlled entities with respect to such person"); Fair Labor Standards Act, 29 U.S.C. § 203(r) (explicitly applying "enterprise" principles to entities under "common control"); ERISA, 29 U.S.C. § 1301(b) (treating businesses "under common control" as a "single employer").

4. *The Legislative History Additionally Supports Construing "Operator" According To Its Everyday Sense*

If further support were needed, the legislative history of CERCLA indicates that "operator" was used in its ordinary sense to mean the person immediately conducting activities at a facility, irrespective of ownership. As this Court has noted, CERCLA was cobbled together from three bills after the 1980 election. See *Exxon*, 475 U.S. at 365-366, 368. The two that defined "owner" or "operator" indicate that Congress intended "operator" to have a traditional meaning rather than the aberrational one advanced by the government (Br. 37-38).

The Senate bill incorporated the circular definitions of "owner or operator" used in the Clean Water Act, 33 U.S.C. § 1321(a)(6). See S. 1480, 96th Cong., § 2(b)(1), in 1 SEN. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., LEGISLATIVE HISTORY OF [CERCLA] 463 (Comm. Print 1983) ("LEG. HIST."). Congress in enacting CERCLA chose to model the definition of "owner or operator" on the definition in Section 311 of the Clean Water Act, 33 U.S.C. § 1321(a)(6), rather than on the definition of "owner or operator" in Section 306 of that Act, 33 U.S.C. § 1316(a)(4). The definition that Congress did *not* choose — "any person who owns, leases, operates, controls, or supervises" (*ibid.*) — contains the additional elements that the government would read into the more limited definition that Congress *did* choose.

The relevant House bill also modeled its definitions on the Clean Water Act. H.R. 85 defined "operator" as,

> in the case of a facility, any person, except the owner, responsible for the operation of the facility by agreement with the owner.

H.R. 85, 96th Cong. § 101(z)(2) (1980), in 2 LEG. HIST. at 1022. Unlike CERCLA, however, H.R. 85 also explicitly addressed the issue of related companies: it excluded from the definition of "owner" any passive lessor to another person with

which the lessor was "not otherwise affiliated," *id.* § 101(x), and defined "affiliated" as "a relationship in which a person owns * * *, is owned by * * * , or is under common control with, another person." *Id.* § 101(y), 2 LEG. HIST. at 1022.

Elsewhere the close link between "operator" liability and immediate responsibility for the release of hazardous substances is equally clear. The Senate Report noted a concern to broaden federal "authority to sue *the disposer or owner* of the disposal site to seek clean up." S. REP. NO. 96-848, at 11 (1980), in 1 LEG. HIST. at 318 (emphasis added). A Senate sponsor and the Administration each stated that the liability provisions reached "*those who release hazardous substances,*" see 1 LEG. HIST. at 685 (statement of Sen. Randolph) (emphasis added), or "*persons involved in handling hazardous substances*." Letter from Assistant Attorney General Parker to Rep. Florio (Dec. 1, 1980), in 1 LEG. HIST. at 780 (emphasis added). The legislative history, then, confirms that Congress viewed an "operator" as the person actively involved in waste-related activities at a facility — not as a person at one or more removes with some form of control over the immediate "operator."

It also is worth noting that CERCLA "represent[ed] an extremely delicate balancing of interests." Letter from Sens. Stafford and Randolph to Rep. Florio (Dec. 2, 1980), in 1 LEG. HIST. at 774. As the Senate sponsors put it: "Had we changed a com[m]a or a period, the bill would have failed." *Id.* at 774-775. That is yet another reason to give the language Congress chose its ordinary meaning rather than an adventurous one that no legislator could have anticipated.

B. CERCLA Does Not Evince Clear Intent To Supplant The State Common Law Of Limited Liability Of Corporations

As this Court has repeatedly observed, "Congress acts . . . against the background of the total *corpus juris* of the states." *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997) (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

When "federal statutory regulation * * * is comprehensive and detailed," as CERCLA undeniably is, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny*, 512 U.S. at 85. See *Atchison, Topeka & Santa Fe Ry.* v. *Brown & Bryant, Inc.*, 132 F.3d 1295, 1300 (9th Cir. 1997) (applying *O'Melveny* to liability of a corporation alleged to be successor to a CERCLA "operator"). This Court does not presume that federal statutes repeal underlying doctrines of state common law unless the statutory language on the point is "clear and explicit" (*Norfolk Redevelopment & Housing Auth.* v. *Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35 (1983)) and addresses the narrow issue at hand. See *Oubre* v. *Entergy Operations, Inc.*, 118 S. Ct. 838 (1998). "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Burks*, 441 U.S. at 478. These principles are dispositive here: CERCLA speaks only to the type of disposal that renders a "person" strictly liable, and not at all to the relationships between corporate "persons."

The government seeks to deflect consideration of the underlying state common law regarding corporate entities by asserting that its interpretation of "operator" simply holds parent companies liable for *their own* acts rather than the acts of their subsidiaries. But the government gives away the game by making clear, as did the district court, that its supposed statutory interpretation charges to *CPC* every act taken by an *Ott II* officer or director who also happened to hold a position with CPC. Assigning liability to CPC on that basis necessarily *assumes* a federal common law of corporations that overrides established state law protections of the corporate entity. That is because, under well-settled common law, dual officers and directors are *not* presumed to be agents of the parent when they act in their capacities with the subsidiary, unless their decisions for the subsidiary were dictated by the parent or there is other

evidence that they sacrificed the subsidiary's interests to favor those of the parent.[18]

The government can point to nothing in CERCLA that manifests any intention to override these common-law principles. Because Congress did not "speak directly to the question," unless a contrary legislative intent is "evident" statutes that, like CERCLA, "invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks omitted); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994). That presumption applies to the "long-established and familiar" standards for disregarding a separate corporate entity based on the involvement of a parent or other stockholder in the corporation's affairs.

The state-law principles at issue are scarcely arcane or obscure. Limited liability through the use of the corporate form "is ingrained in our economic and legal systems." Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929). The standards for removing the protections of the corporate entity by piercing the corporate veil are equally "ingrained." Moreover, strong policies favor the retention of state law in the absence of clear congressional intent to displace it. This Court has instructed that "federal courts should incorporate state law as the federal rule of decision * * * particularly * * * in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98 (citation and internal quotation marks omitted). That certainly is the case where, as here, a corporation invests in a discrete business by acquiring a separate subsidiary corporation and respects the

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[18] See, *e.g.*, *Lusk* v. *FoxMeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997); *United States* v. *Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir.), cert. denied, 475 U.S. 1014 (1985); *Wiseman* v. *United Dairies*, 324 Mich. 473, 37 N.W.2d 174, 182 (1949).

separate status of the subsidiary according to the applicable state-law standards. As a consequence, the Sixth Circuit was correct to apply the "traditional concepts of limited liability associated with the corporate form" (Pet. App. 12a).

1. *The Government Unjustifiably Presumes That CERCLA Silently Displaces The Common Law Treatment Of Dual Officers*

At the outset, the government completely ignores "the well established principle that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." *Lusk* v. *FoxMeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997). Courts, including this Court, routinely recognize the dual nature of the duties and responsibilities of these individuals. The presumption is that the individuals' acts taken in the course of managing the subsidiary are by and for the benefit of the subsidiary, not instances of manipulation by the parent in disregard of the subsidiary's interest. See *Pullman's*, 115 U.S. at 596; *Lusk*, 129 F.3d at 779; *Edwards Co.* v. *Monogram Industries, Inc.*, 730 F.2d 977, 985-986 (5th Cir. 1984) (en banc); *Fisser* v. *International Bank*, 282 F.2d 231, 238 (2d Cir. 1960). Cf. *Peterson* v. *Chicago, Rock Island & Pacific Ry.*, 205 U.S. 364, 390-391, 394 (1907).

The government simply assumes that CERCLA swept away that aspect of pre-existing law relating to the liability of separate but related corporate entities. What it urges, therefore, is "not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted" — *i.e.*, an explicit provision altering the liability of parent corporations and other shareholders — "may be included within its scope." *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin* v. *United States*, 270 U.S. 245, 250-251 (1926) (Brandeis, J.)). But such an effort "[t]o supply omissions transcends the judicial function." *Ibid.* See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981) (the "authority to construe a statute is fundamentally different from the authority to fashion a new rule"). That is especially true when the omission relates to a well-established body of state corporation law. See *United States* v. *Texas*, 507 U.S. at 534. As the Court remarked in *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380 (1988):

> Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute * * *; it is most improbable that it would have been made without even any mention in the legislative history.

CERCLA, however, plainly makes no "specific provision" respecting the liability of a parent corporation or other shareholder of a corporation that is the apparent "operator" of a "facility." The legislative history likewise does not hint at such a sea-change in corporate law.[19] There is, in short, no textual justification for disregarding the full backdrop of common law that directly addresses both the larger topic of disregarding the corporate entity and the lesser included presumption that an officer of a subsidiary who also holds a position with the parent is the agent of the subsidiary when he purports to act for that company, not an infiltrating agent of the parent.

2. *The "Remedial Purpose" of CERCLA Does Not Justify Distorting Its Terms to Create a Federal Common Law of Corporate Shareholder Liability*

a. The government falls back (Br. 26) on the shopworn claim that the "remedial" purpose of CERCLA — a purpose shared by every statute creating civil liability — justifies expanding the scope of the statute beyond its terms. But that approach, which here would transform a simple allocation of liability to facility operators into a new and undefined vehicle

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[19] Indeed, the only tangentially relevant statements reflect an expectation that "issues of liability not resolved by" the text of CERCLA should be governed by "traditional and evolving principles of common law." See, *e.g.*, 1 LEG. HIST. at 686 (statement of Sen. Randolph); *id.* at 778 (statement of Rep. Florio). That common law, this Court has made clear, must be borrowed from the appropriate state.

for disregarding the corporate form, "ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986). Allowing perceived remedial intent to enlarge the terms of a statute "takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* at 374. See *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995).

Although a court may believe that CERCLA's remedial goals are so broad that they justify holding liable a person who "controls" or "participates in the management" of the person who actually operates a facility, courts cannot rewrite CERCLA in order to serve a judicial perception of the statutory purpose. See *Darden*, 503 U.S. at 325-326. In effect, by urging that CERCLA be read to disregard separate corporate entities, the government is simply "second-guess[ing] the methods Congress used to achieve its purposes." *Exxon*, 475 U.S. at 375. But additions to the liability scheme cannot be justified by a judicial perception "[t]hat Congress has not chosen the most comprehensive or efficient method of attacking the problem of hazardous substance discharges." *Id.* at 371. "The short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979).

In any event, the federal courts hold no commission to broaden statutory liability based on judicial speculation that Congress "would have done so had it thought about it." *West Virginia Hospitals*, 499 U.S. at 100. The government's contrary view "profoundly mistakes" the role of the courts vis-à-vis Congress (*ibid.*) and of federal legislation vis-à-vis the pre-existing and persisting "*corpus juris* of the states." *Atherton*, 117 S. Ct. at 670.

b. These concerns are especially acute given the attempt to use the word "operator" as a vehicle to create a specialized application of a federal common law of corporations. In such

circumstances, this Court permits unenacted federal substantive legal standards to displace the underlying state rules of decision only in response to a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87 (quoting *Wallis*, 384 U.S. at 68).

Here, as in *O'Melveny*, "what is fatal to [the government's] position * * * is that it has identified no significant conflict with an identifiable federal policy or interest." 512 U.S. at 88. Here, again, "[t]here is not even at stake that most generic (and lightly invoked) of alleged federal interest, the interest in uniformity" (*ibid.*), for "[t]he rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only" the government's "rights and liabilities * * * with respect to primary conduct on the part of private actors that has already occurred" (*ibid.*) — and occurred here, as in most CERCLA cases, many years before CERCLA was enacted.[20] "Uniformity of law might

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[20] Retention of state-law protections for the corporate entity does not give parent corporations *carte blanche* to abuse the "facilities" of their subsidiaries, and certainly does not "absolve[ ] parent corporations of liability[ ] even though they actively participated in the *operation* of a *facility* and *share responsibility* for the conditions at the *hazardous waste site*" (U.S. Br. 16) (emphasis added). A parent corporation could be directly liable as an operator at a facility owned by its subsidiary if, for example, the subsidiary held title to real estate that the parent used. Similarly, a parent could "operate" a facility that was owned and also operated by its subsidiary. For example, CPC would have operated the Muskegon "facility" if it had refined corn products (and disposed of hazardous wastes) there while Ott II made chemicals, or if CPC had dumped wastes from off-site manufacturing into the Muskegon lagoons. This Court has considered similar situations. *E.g.*, *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 405-410 (1960) (Frankfurter, J., concurring); see also *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 755-756 (7th Cir. 1989). And, of course, improper use of a subsidiary may render a parent liable under state law rules for piercing the corporate veil. That individual shareholders may rely on the same traditional protection (see U.S. Br. 16) -- a protection that may be lost if they personally participate in waste disposal (see, *e.g.*, *Donahey* v. *Bogle*, 129 F.3d 838, 840, 843 n.7 (6th Cir. 1997) (en banc), petition for cert. filed, No. 97-1163) — raises no additional problems, especially because culpable individual sole shareholders are particularly susceptible to the type of conduct that leads to disregard of the

facilitate" the government's (and private plaintiffs') "litigation of these suits, eliminating state-by-state research and reducing uncertainty[,] but if the avoidance of these ordinary consequences qualified as an identifiable federal interest" federal common law would become the rule, not the exception. *Ibid.* That is a result this Court has soundly rejected.

The only federal "policy" that the government can identify is the condition of its purse. Just as in *O'Melveny*, the government claims (Br. 26, 28 n.16) that to take CERCLA at face value, and thus to respect state-law limitations on intracorporate and corporate-shareholder liability, would "'disserve the federal program'" by allowing States to "insulate" persons from liability for clean-up costs, "thereby imposing costs 'on the nation's taxpayers, rather than on'" private parties. 512 U.S. at 89 (quoting government brief). But that concern does not justify the insertion of "any conceivable legal rules" that ease the government's burden: "there is no federal policy that the fund should always win." *Id.* at 88; see *Santa Fe*, 132 F.3d at 1301.

Moreover, the "alleged need for a more expansive view of * * * liability than state law currently provides" is not closely tied to CERCLA's goal of ensuring that hazardous wastes are cleaned up by the same "persons" that were responsible for their disposal. *Santa Fe*, 132 F.3d at 1300. State veil-piercing law also is directed at imposing liability on responsible parties when the corporate form is abused. See *id.* at 1301.[21] When to

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corporate form. The integrity of the statute does not require construing the word "operator" to nullify the corporate entity.

[21] The government also cannot explain why the word "owner" preserves state law concepts of the corporate entity, as the courts have uniformly found, *e.g.*, *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993); *Schiavone* v. *Pearce*, 79 F.3d 248, 254 (2d Cir. 1996); *United States* v. *USX Corp.*, 68 F.3d 811, 823 (3d Cir. 1995), but the word "operator" does not. Since ownership is far more direct and unimpeded than operation — and since "owner" liability may attach without any involvement in waste-producing or disposing activity — one would think that, if the government's logic were sound, all owners of owners would be "directly" liable, as would owners of owners of owners *ad infinitum*. But, although the government apparently can tolerate limiting owner liability to the corporate entity holding title to a facility (unless state law would allow piercing the corporate veil), it bristles at applying the same principles to operator liability. There is no basis for this distinction. See *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 680 (1990) (the corporate form provides investors with "the immunization of their personal fortunes from liability for the actions of the association").

attribute the actions of one corporate "person" to another by virtue of the latter's relationship with its subsidiary "involves a host of considerations that must be weighed and appraised," a "weighing and appraising" that this Court has held belongs to government bodies other than the federal courts. *O'Melveny*, 512 U.S. at 89. See *id.* at 90 (Stevens, J., concurring). That is particularly true here, where the proposed "federal rule would disrupt" long-settled "commercial relationships predicated on state law." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979); *Santa Fe*, 132 F.3d at 1300.

"Simply put," the federal courts "have no warrant to expand what little federal common law of necessity fills the interstices of our federated legal system — especially in an area where the Congress had legislated to some extent yet stopped short of supplanting a well-developed body of state law." *A.I. Trade Finance, Inc.* v. *Petra International Banking Corp.*, 62 F.3d 1454, 1459 (D.C. Cir. 1995). Given how comprehensively CERCLA addresses the subjects that it *does* address, "the lawmakers' silence upon [the] particular subject" of liability transcending a corporate entity "should be taken to reflect their intention to leave state law undisturbed in that regard — not as an invitation to the federal courts to conjure up a 'federal common law untethered to a genuinely identifiable (as opposed to a judicially constructed) federal policy.'" *Id.* at 1460 (quoting *O'Melveny*, 512 U.S. at 89).

c. Indeed, if any canon of construction applied here, it would be the rule of lenity, because the scope of the "operator" definition "has criminal applications." *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992). Status as an "owner or operator" carries with it notification and reporting

requirements that, if violated, may subject the operator to criminal liability. 42 U.S.C. §§ 9603(c), 9603(d)(2). Because the reach of these obligations — and thus the criminal sanctions — may depend upon the scope of the "operator" definition, the statutory language must be construed narrowly even when civil liability is at stake. *Thompson/Center Arms*, 504 U.S. at 517-518. Accordingly, the word "operator" cannot be read to trench upon the common law protections for parent corporations and other corporate shareholders.

3. *The Government's Statutory Analogies Are Inapposite*

The government attempts to bolster its argument by citing (Br. 36-39) a handful of cases in which this Court, in addressing other statutes, has disregarded corporate entities without recourse to state law. The Court did not take the casual approach toward corporate entity law that the government suggests here, however, but noted the importance of the rule of limited liability and found extraordinary reasons to override it. *E.g.*, *Anderson* v. *Abbott*, 321 U.S. 349, 362-363 (1944).

Thus, the government observes that this Court disregarded the corporate form of a grossly undercapitalized bank holding company in *Anderson*. As the Court recently explained, however, "[i]n *Anderson*, federal jurisdiction was founded upon a federal law, 12 U.S.C. §§ 63, 64 (repealed), which specifically made shareholders of an undercapitalized federal bank liable up to the par value of their stock, regardless of the amount actually invested." *Peacock* v. *Thomas*, 116 S. Ct. 862, 866 n.4 (1996). It is a small leap indeed from an explicit statutory directive to disregard the corporate entity and hold shareholders liable — what the Court described as a "statutory policy of double liability" (321 U.S. at 362) — to a decision also to hold liable the shareholders of those shareholders.

Similarly, *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), provides a poor excuse for ignoring the state law of the corporate entity. International law, not state law, governed the corporations at issue in that case: they were creations of the Communist

government of Cuba, used to avoid liability in such a way that veil-piercing might well have been available under the law of any American state. The labor cases also have no relevance here. *NLRB* v. *Deena Artware, Inc.* 361 U.S. 398 (1960), involved the application of common-law veil-piercing in a contempt proceeding in which the defendants had shifted assets among a series of shell corporations in efforts to preclude enforcement of an earlier judgment. And in *Radio & Television Broadcast Technicians Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965), the Court's deference to the National Labor Relations Board's development of a "single employer" test simply represents the extraordinarily wide leeway this Court has given the NLRB to define terms in the statutes under its jurisdiction.[22]

The government's reliance on *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), is simply puzzling. In that case, this Court did not deprive any corporation of the limited liability afforded by state law, but rather held that an agreement between a wholly owned subsidiary and its parent could not constitute a "conspiracy" under the antitrust laws "[b]ecause there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary." *Id.* at 773. Equally far afield is *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703 (1974). *Bangor Punta* also had nothing to do with limiting liability to the corporate entity, although it did involve misuse of the corporate form: this Court barred the purchaser of a subsidiary corporation, ineligible to bring a shareholder derivative action and estopped from suing the seller in its own name, from bringing an action against the seller in the name of the acquired company.

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[22] See, *e.g.*, *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 100 (1985). Moreover, the NLRB's test incorporates the rigors of common-law veil-piercing far more than the indeterminate analysis favored by the government and used by the district court in the present case. See, *e.g.*, *Esmark*, 887 F.2d at 753-760.

In sum, this Court's cases do not support the government's effort to derive from congressional silence an intent to cast aside, wholesale, state law principles limiting the liability incurred by corporate entities.

C. Extending "Operator" Liability To Parent Corporations That Actively Oversee Their Subsidiaries Would Lead To Untenable Results

One reason why this Court requires Congress to make its intentions clear when it sets out to displace a significant part of the established legal landscape (*e.g.*, *United States* v. *Texas*, 507 U.S. at 534) is that such legislative clarity is more likely to yield a coherent legal standard to replace the common-law standard that has been cast aside. The uncertainty and fluidity of the government's proposed rule — not to mention its drastic and harmful consequences — demonstrates that the Court's caution is warranted.

1. *The Standardless Analysis Advanced By The Government Would Reach Most Parent Corporations Of Actual "Operators"*

The government does not settle upon a precise standard of parent corporation "operator" liability. That is not surprising: even the courts that endorse similar "participation and control" tests hesitate to define a standard that would constrain their *ad hoc* analyses. See, *e.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (declining to decide "the exact standard necessary for a parent to be an operator"), cert. denied, 498 U.S. 1084 (1991); *Schiavone* v. *Pearce*, 79 F.3d 248, 254 n.5 (2d Cir. 1996) (same).

The government does make clear that it would be sufficient to hold liable the parent corporation of any "operator" so long as the parent "employs its own agents" — by which the government means any person holding positions in both the parent and the subsidiary — "as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary." Br. 44. The rest of the

analysis apparently would be an entirely discretionary assessment of whether the parent corporation or other shareholder has "step[ped] beyond its role as a stockholder" (Br. 41). The low threshold for sufficiency, and the unguided nature of the analysis, would lead to especially unprobative inquiries in the CERCLA setting, where litigation would address such issues as the degree of "participation and control" by one company over another many decades before trial.[23]

The government does not commit itself to any set of relevant factors. The cases on which it relies, and the opinion of the district court in this case (which the government seems to endorse, Br. 44 n.32, 45-48), make clear that the *ad hoc* analysis supposedly inspired by the term "operator" is no more than a junior-varsity veil-piercing inquiry, using similar factors directed toward a similar goal — determining when a parent corporation has overstepped the boundaries consistent with limited liability — but substantially lowering the threshold for imposing liability. Whether the parent and subsidiary have directors and officers in common, whether the parent exercises control over the subsidiary's business decisions, and whether the parent is involved in the subsidiary's financial affairs all regularly appear in veil-piercing analyses. See S. PRESSER, PIERCING THE CORPORATE VEIL § 1.03[4] (1997); P. BLUMBERG, LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS 16-17 (1983). See U.S. Br. 45-48 & n.32.[24] The government envisions (and lower courts have put into practice) a CERCLA-specific veil-piercing analysis that is not limited by the

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[23] Indeed, under this amorphous and unworkable standard, even minority shareholders might be held liable on the theory that they controlled an "operator" in some way. See *Pinal Creek Group* v. *Newmont Mining Corp.*, 926 F. Supp. 1400, 1414-1415 (D. Ariz. 1996), rev'd in part on other grounds, 118 F.3d 1298 (9th Cir. 1997), petition for cert. filed, No. 97-795.

[24] The resemblance to veil-piercing is no coincidence. The government's lead authority, *Kayser-Roth*, affirmed the analysis and decision of a district court that had used the same factors both to pierce the corporate veil and to impose "direct" operator liability by virtue of a watered-down veil-piercing analysis. See 724 F. Supp. 15, 22, 24 (D. R.I. 1989).

principles developed in state common law — a veil-piercing analysis with no rules (and thus no uniformity), amounting to a purely factual sniff test not coherently reviewable on appeal. Any attempt to refine the government's "participation and control" analysis can only heighten the familial resemblance — and the contrast — between that test and the legitimate, traditional veil-piercing inquiry.

Indeed, the principal factors on which the government would rely to make a parent the "operator" of its subsidiary's facility typify the parent-subsidiary relationship. By definition, a parent corporation controls its subsidiary. BLACK'S LAW DICTIONARY 1428 (6th ed. 1990). "[T]he parent's exercise of control * * * occurs in every parent-subsidiary relationship." BLUMBERG, PROCEDURAL PROBLEMS, *supra*, at 18. In addition, this Court has recognized that, for a parent corporation to "participat[e] in the affairs" of its subsidiary is "normal and usual," so that the subsidiary's corporate entity will be disregarded only if the subsidiary is a "mere agency or instrumentality of the owning company or companies." *Chicago, Milwaukee & St. Paul Ry.* v. *Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918) (finding instrumentality where subsidiary's board had no power to conduct its financial affairs, to choose a chief executive officer, or to choose the persons with whom or the terms on which the subsidiary would do business); see also *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 759 (7th Cir. 1989) ("Parents * * * are almost always 'active participants' in the affairs of an owned corporation.").[25]

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[25] The government pointedly avoids placing significance on the usual prerequisites for disregarding a subsidiary's identity, such as indiscriminate intermingling of business transactions, employees, and property; circumvention (not, as the government would have it, use) of the subsidiary's "decisionmaking hierarchies" (U.S. Br. 45); inadequate capitalization or siphoning of funds; failure to hold out the subsidiary as a separate enterprise; and decisionmaking that benefits the parent while harming the subsidiary. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 355-356 (3d ed. 1983); see *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510, 523-524 (1941).

But that is not all. Most parent corporations would qualify for "operator" treatment based on the sole criterion that the government articulates (Br. 44): giving officers of the parent positions within the subsidiary as well. "Common management and ownership are ordinary aspects of a parent-subsidiary relationship." *Lusk*, 129 F.3d at 778. And it is "normal" for a parent corporation and its subsidiary to have "identical directors and officers." H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 355 (3d ed. 1983)). The government's suggestion (Br. 44) that this is not the "typical practice" is either disingenuous or misinformed.

This case illustrates the limitless pliability of the analysis that the government asks this Court to adopt. The district court based CPC's liability for "operating" the Ott II facility largely on CPC's *leaving Ott I officers in place* while assigning two of them separate duties for CPC. If the "participation and control" test effectively pierces the corporate veil based on the acts of employees such as Ott and Eiszner, then any use of dual directors or officers would subject a parent corporation to CERCLA liability for the operations of its subsidiary.

2. *A Standardless Expansion Of Parent Corporation "Operator" Liability Would Have Undesirable Consequences*

As the Sixth Circuit recognized (Pet. App. 14a-15a), the overbroad and uncertain standard of liability that the government advocates would disserve the environmental goals of CERCLA while thwarting the strong public policies underlying the traditionally separate treatment of parent and subsidiary corporations. Because a parent corporation is more likely to be held liable under the "participation and control" standard the more attention it pays to the affairs of its subsidiaries, that standard creates perverse incentives for parents to exercise less supervision over their subsidiaries, *especially* in environmental matters.

Given proper respect for the corporate form, parent corporations have incentives to ensure that their subsidiaries strictly

comply with environmental standards and to aid the subsidiaries in attaining that compliance; non-compliance could jeopardize the parent's sizable investment in the subsidiary. Under the government's test, however, responsible environmental oversight by the parent would jeopardize the *parent's* assets. That test would create incentives of an entirely different kind.

The weakened and uncertain status of the corporate entity under the standard proffered by the government also would discourage corporations from investing in waste sites and putting them to productive use. No rational corporation would invest in a known waste site if by doing so it either had to place its own assets at risk or in effect had to abandon the principal business of the waste-site subsidiary (along with the parent's investment) to an entirely unsupervised management.

Not only would the government's standard have undesirable effects on future conduct, but it would unjustifiably penalize "private parties [who] have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards," *Kamen*, 500 U.S. at 98, and in particular have "relied on state corporation law when making corporate acquisitions and in forming * * * corporations." *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring). The creation and imposition of a new federal rule of parent corporation liability for CERCLA would be especially unfair, because it would cast aside legal rules that companies relied on for decades and would impose huge monetary penalties based on conduct by subsidiaries that violated no law when it took place. Such "disrupt[ion of] commercial relationships predicated on state law" is unwarranted where there is no sign that Congress intended to work that result in CERCLA. *Kimbell Foods*, 440 U.S. at 729. As Chief Judge Cardozo observed, loosening the principles of corporate integrity to "ignore the separation between subsidiary and parent" for result-oriented purposes "thwart[s] * * * public policy" rather than "defending or

upholding it." *Berkey* v. *Third Avenue Ry.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926).

3. *Allowing The Word "Operates" To Support Creation Of A Federal Standard For Parent Corporation Liability Would Encourage The Development Of Federal Common Law Veil-Piercing Based On Other Statutory Terms*

If this Court holds that the word "operates" is enough to brush aside state corporation law, then, contrary to this Court's earlier holdings, "the entire corpus of state corporation law" quite possibly *will* be replaced "simply because a plaintiff's cause of action is based upon a federal statute." *Burks*, 441 U.S. at 478. If a corporation that oversees a legally separate "operator" of a "facility" thereby becomes an "operator" in its own right, the many federal statutes placing duties or liabilities on "operators" may be transformed in scope — as may the statutes affording privileges or benefits to "operators."

Moreover, if this Court were to uphold the presumption, contrary to common law, that dual officers and directors render a parent corporation liable for all activities of the subsidiary in which those individuals play any part, any noun or verb in the United States Code could serve as the basis for a "new, middle ground" of parent corporation liability. The path would be cleared for lower courts to make, for example, the parent-"employer" of a subsidiary-"employer" liable to an employee of the latter under a far wider set of circumstances than the law currently allows — for example, if the employee reports to an officer of the subsidiary who also holds a position with the parent corporation. The use of the mundane word "operator" in CERCLA provides no good reason to prompt such a global transformation in federal law.

D. CPC Cannot Be Held Liable As An "Operator" Under Any Reasonable Standard On This Record

1. The government (Br. 45) invites this Court to misapply the rule that "findings of fact *concurred in* by two lower courts"

will not be set aside except in response to exceptional showings of error. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (emphasis added). But the court of appeals did not in any sense *concur* in the findings of the district court. Contrary to Michigan's contention (Br. 13), on appeal CPC pointed out the lack of record support for many of the district court's findings. See CPC Opening C.A. Br. 5-38. The Sixth Circuit did not have to address those contentions directly, because it determined that the legal question it was called upon to decide was not close under the applicable veil-piercing rule.

But the dearth of factual support for the district court's broad conclusions did not escape the Sixth Circuit's notice. To the contrary, the court of appeals remarked that, "*[i]f anything*, the *facts* recited by the district court" might "support liability" under a theory of "exertion of power or influence through active participation in the subsidiary's business," but could not support liability based on "actual operation of the subsidiary's business" — much less operation of the Muskegon "facility." Pet. App. 12a (emphasis added). The Sixth Circuit rejected as factually unsupported the district court's contrary findings on this and other issues. See, *e.g.*, *id.* at 12a, 18a, 21a-22a, 24a. In other ways, the court of appeals distanced itself from the district court's findings of fact; rather than adopting those findings, the Sixth Circuit "summarize[d] them * * * by way of background," even injecting the qualifier "[a]ccording to the district court." *Id.* at 3a. Indeed, the government earlier disputed some of the Sixth Circuit's factual statements, claiming that the district court had found otherwise. *E.g.*, U.S. Pet. 20 n.6. See also U.S. Br. 15 n.13; Mich. Pet. 18 & n.4.

At most, the court of appeals assumed *arguendo* the sustainability of the general findings that CPC owned 100% of Ott II, "participate[d] on Ott II's board of directors," and "cross-pollinat[ed] * * * officers," some of whom "were involved in decision-making and" at the highest level "daily operations" of Ott II's business as a whole; that CPC officials "active[ly] participat[ed] * * * in" — not "controlled" — Ott II "environmental matters"; and that CPC exercised high-level "financial control of Ott II through approval of budgets and capital expenditures." Pet. App. 16a-17a. But the court of appeals did not mention, much less "concur[] in" (*Rogers*, 458 U.S. at 623), the more extravagant and unsupported findings of the district court on which the government relies, much less the allegations that the district court itself did not find as fact. Those items cannot sustain a judgment of liability without undergoing a review for clear error that many could not survive.

2. If this Court adopted the test that the government seems, inconsistently, to endorse — whether a parent corporation "actively participated in the *operation* of a *facility*" (Br. 16; emphasis added) rather than in the overall management of the *subsidiary* — then, depending on how the new test was defined, the judgment either would have to be affirmed on the ground that the Sixth Circuit rejected an indistinguishable basis for liability (Pet. App. 12a, 17a-18a) or remanded for the application of the new standard to the evidence. As the government acknowledges (Br. 42), the district court "concluded that a parent corporation" may be liable for the operation "of its subsidiary's facility when it actively participates in, and exercises control over, the operations of the *subsidiary*" and simply equated that intermediated corporate involvement with "operation of the *facility*" (emphasis added).

But on an appropriate review of the record, CPC would not be liable even under any reasoned standard that departed from established state law principles. If such a standard could be derived from the cases that apply the sort of *ad hoc* analysis of parent-subsidiary relations that the government advocates here, that standard might be that a parent corporation would be liable as an "operator" of a facility operated by its subsidiary only if the parent exercises "pervasive control" over the "daily operations of the subsidiary," *Jacksonville Electric Auth.* v. *Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993), or, more properly, over the "daily operations" of the waste "facility."[26] Such

[26] Like the government, we place to one side the outlier decision in *Nurad*,

"pervasive" and "total influence and control" is something akin to alter ego liability under state law. *Kayser-Roth*, 910 F.2d at 27; see also *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209, 1222 n.13 (3d Cir. 1993).

Although the district court broadly *concluded* that CPC "controlled" Ott II, the *facts* found by the district court make clear that CPC did not exercise "pervasive" control over operations at the Muskegon facility. The district court found that Ott II's overall policies were established by *its* "active board" of directors, which "continu[ed] the tradition established in the Ott I era of functioning in an engaged, participatory manner." Pet. App. 67a. And when the district court addressed day-to-day operations at the Muskegon plant, it recognized that Ott II managers, *not* CPC, controlled those activities: "Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC," policies that ran the gamut from sales and marketing to "manufacturing[ ] and environmental matters." *Id.* at 69a.

As explained above, the district court premised CPC's operator liability primarily on CPC's *leaving Ott I officers* (Eiszner and Ott) *in place* while assigning them separate duties for CPC, and on the later appointment by Ott II's board of Warner, a CPC executive with responsibility for coordinating relations with and among subsidiaries, as CEO. But even the better-reasoned decisions that apply an improvised federal rule of parent corporation liability in the CERCLA context have explicitly recognized that the "mere fact that * * * individuals who were officers and directors for [the parents] concurrently served as officers and directors for [the subsidiary]" does not even "*tend* to establish" the type of "pervasive control" by the parent necessary to make it liable for its subsidiary's acts, but

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Inc. v. *William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), cert. denied, 506 U.S. 940 (1992), which suggested that "direct" liability might attach to all majority stockholders of "operators." Although the government does not defend that bizarre conclusion, the only factor the government adds — the presence of dual officers or directors — narrows the field only slightly.

amounts only to appropriate parental oversight. *United States* v. *TIC Investment Corp.*, 68 F.3d 1082, 1092 (8th Cir. 1995) (emphasis added) (applying "pervasive control" analysis to "arranger" liability under 42 U.S.C. § 9607(a)(3)), cert. denied, 117 S. Ct. 50 (1996). Dual officers could be instruments of "pervasive control" only if the parent corporation employees who served on the subsidiary's board or in its management "made any decision that was dictated by [the parents] or otherwise exhibited divided loyalty when attending to [the subsidiary's] business." *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 564 (3d Cir. 1997).

There was no evidence that any decisions of dual officers or directors improperly favored CPC at Ott II's expense. Warner's business decisions may have been unwise but their shortcomings had nothing to do with CPC's interests; that Ott II had to compete with CPC for Eiszner's attention reflects a characteristic problem whenever a valued employee has roles in several organizations. See U.S. Br. 46. The government also asserts (Br. 45), however, that the district court found that CPC "had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site." But the government's blanket citations (see Pet. App. 67a-77a, 110a-112a) do not reflect any finding by the district court that CPC allowed Ott and Eiszner to continue running what had been Ott's company "specifically to ensure that CPC would * * * maintain close control over the day-to-day running" of Ott II's "business," much less of the waste-disposal "facility." Nor do those findings reflect anything resembling "close control" by CPC "over the day-to-day running of [Ott II]'s business at the Muskegon site," much less control of the "facility" there.

The government also relies heavily (Br. 46) on a collection of several memoranda issued by G.R.D. Williams in the course of Ott II's seven-year existence to show that CPC "actively

participated in Ott II's environmental matters." The Sixth Circuit (see pp. 44-45, *supra*) did not agree with the government that the evidence respecting Williams demonstrated "control[]" by CPC (Br. 46) (*ibid.*), as the underlying facts showed only that Ott II kept Williams abreast of some environmental issues. In any event, much of what the district court *did* find with respect to Williams (Pet. App. 74a-76a) could not withstand clear-error review. While Williams generated memoranda every several months dispensing advice and suggesting that he be involved in Ott II environmental compliance activities, there was no evidence that Ott II acceded to these demands or altered a single decision in response to Williams' preferences. The evidence, to the contrary, was that Ott II and CPC alike considered Williams to have no authority to "require anybody in any location to do anything." C.A. App. 3269; see also *id.* at 2995-2996. The evidence reflected only that Ott II gave Williams "copies after the fact of decisions which [Ott II] had reached." *Id.* at 2895-2896, 2914-2915.

For example, uncontradicted evidence showed that Williams did not help plan the single presentation to MWRC that he attended or otherwise influence what was said at the meeting. C.A. App. 3053. The government's assertion (U.S. Br. 46; see Pet. App. 75a) that Williams prevented Ott II from presenting a biological treatment option at that meeting is unsupported, resting entirely on Williams' expression of his views in a memorandum dated two months *after* the meeting, *after* MWRC had been informed by Ott II's project consultant that the Ott II board had asked for "complete plans including waste treatment" (Exs. 327, 328), and *after* Ott II's consultants had given MWRC an analysis of wastewater treatment options that *included* biological treatment. See C.A. App. 1987, 1996, 2160, 2180; Ex. 341, at 23-24. Ott II had decided to defer installing a biological waste treatment facility *before* Williams offered his advice, and MWRC did not object to that course of action. C.A. App. 1992-1993, 1996, 2145-2147; Ex. 319. But Williams' suggestion that, in order to maximize tax benefits, Ott II defer environmental expenditures it had settled upon,

drew a sharp and dismissive response from Ott II's management: "we have no intention of delaying [the groundwater project] until early 1968 [because] it's instrumental to the success of this company [*i.e.*, Ott II] to get this thing handled as quickly as possible and we will stay on our own timetable." C.A. App. 2892, 2031-2033.[27]

The government also overstates the record (Br. 47) with respect to "CPC's involvement in Ott II's financial affairs." Ott II maintained its own general and payroll bank accounts; its accounting and financial records were separate from CPC's, and inter-corporate transactions were duly charged and recorded. C.A. App. 741, 742, 3456-3458. The district court's finding (Pet. App. 77a; see U.S. Br. 47) that "Ott II's funds were commingled with CPC's in a joint account" is a bizarre conclusion based on a single fact: CPC contributed funds to Ott II by transferring money to Ott II's separate operating account in Muskegon. See Tr. 843-844. That is not "commingling" under any normal standard, and the district court did not rely on that finding in concluding that CPC was liable. See Pet. App. 110a-111a. The government (Br. 47) and the district court (Pet. App. 77a) also found significant in itself CPC's provision of funds to Ott II; that reverses the classic analysis, which counts against the separate personality of the parent any acts of looting the subsidiary, rather than making further investments in it. See generally PRESSER, *supra*, at 1–51 n.8; P. BLUMBERG, LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW 217 (1987). Finally, the government suggests (Br. 47) that CPC "operated" Ott II's waste-disposal "facility" by "limit[ing] the amount of capital expenditures permitted * * * without prior approval from CPC[]." The government does not explain what that typical feature of the parent-subsidiary relationship might have to do

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[27] The involvement of a CPC attorney in negotiating "the use of a county wastewater treatment system" bears no relation to the on-site "facility" at issue here. Even if occasional provision of legal resources could render a parent corporation an "operator" of a "facility" where its subsidiary disposed of hazardous waste, providing counsel with respect to an entirely different public "facility" cannot prove that the parent operated the on-site "facility."

with "operating" a "facility." The government's reliance on this point merely underscores the more significant fact that Ott II pursued its day-to-day (as opposed to extraordinary) activities and expenditures *without* seeking CPC's approval.

The "many other findings" to which the government refers (Br. 47) — CPC's ownership of 100% of Ott II's stock, its assistance on a handful of occasions in labor negotiations, and its intermittent provision of a few other corporate services (Pet. App. 110a-111a) — also are typical of the parent-subsidiary relationship. Such activities plainly do not demonstrate "pervasive control" by CPC over day-to-day operations of Ott II, much less control over the use of the "facility" at issue.

The Sixth Circuit correctly concluded that these routine activities did not show that CPC "directly operate[d] the facility itself." Pet. App. 17a-18a. Because CPC was not a "corporation[ ] that cause[d] environmental degradation" at the Muskegon site, and because its "active interest in the affairs of its subsidiary" was an entirely "proper use of the corporate form" that could not "authorize assignment" to it of Ott II's liability (*id.* at 17a), the Sixth Circuit correctly concluded that CPC was not liable as an "operator" here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,
Petitioner

vs.

CPC INTERNATIONAL, INC., et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY

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RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

STATEMENT OF THE CASE

Introduction

Aerojet-General Corporation is in a unique position. All parties acknowledge that it never owned the contaminated site at issue in this case. More importantly, all parties acknowledge that neither Aerojet nor its subsidiaries contributed new contamination to the site. Because a key purpose of CERCLA is to impose the costs of remediation on the parties that caused the pollution, as the government repeatedly urges, Aerojet should not be liable. Holding an innocent party responsible for pollution caused by unrelated third parties undermines the very purpose the government says it wants to vindicate in this case.

The outcome in this case that would vindicate the statutory purpose of CERCLA and that would also be faithful to the statutory text is the one Aerojet has urged since the inception of this litigation. CPC International should be liable under Section 107(a)(2), not because it participated in managing its subsidiary, but because it directly operated facilities at a time those facilities were polluting the site owned by CPC's subsidiary. In contrast, Aerojet should not be liable under Section 107(a)(2) because it did not operate facilities at a time of any polluting activities at the site. The outcome Aerojet urges avoids the errors inherent in the more extreme positions advocated by the government, on the one hand, and by CPC, on the other hand.

By attempting to capture Aerojet, as well as CPC, in its liability net, the government has ignored the very statutory purpose it says it wants to vindicate, and it has improperly isolated one phrase in the full statutory text. To impose liability under Section 107(a)(2) regardless of whether new polluting activity occurred during the company's tenure at the site would ignore the statutory text limiting liability under the Section to persons who owned or operated facilities "at the time of disposal" of pollutants at the site. Because all of the pollution at the site was disposed of before Aerojet and its subsidiaries

had any connection with the site, liability under Section 107(a)(2) cannot apply to Aerojet.

CPC goes to a different extreme in its effort to escape liability. Despite the pollution that occurred while CPC was participating in environmental policy-making and day-to-day operations at its subsidiary's site, CPC argues that it cannot be liable because the overall corporate relationship between CPC and its subsidiary did not warrant veil-piercing under state corporate law. This extreme position improperly equates principles of state corporate law with the limits of liability under a federal statute. State corporate law properly controls the derivative liability of a corporation for the acts of its subsidiary, but that law does not define the direct liability of the corporation created by the statutory text itself.

Direct liability under Section 107(a)(2) turns not on derivative liability springing from the overall relationship between two particular corporations but on what the allegedly liable person itself did at the time of waste disposal at the "facility" owned or operated by the allegedly liable person. CPC is properly liable under this section because, as the district court found as a matter of fact, CPC involved itself in both "major decision-making and day-to-day operations" at its subsidiary's site. (Pet. App. 111a.) Indeed, CPC's own director of governmental and environmental affairs directly assisted Ott in delaying proposed solutions to Ott's polluting activity. (*Id.* at 74a-76a.) This level of activity goes beyond the "participation and control" test proposed by the government and rejected by the Court of Appeals, and properly subjects CPC to direct statutory liability.

Nature and Summary of the Case

This case involves responsibility for pollution caused by prior owners and operators of a site now owned by Cordova Chemical Company of Michigan ("Cordova/Michigan"). Aerojet-General Corporation ("Aerojet"), Cordova Chemical Company

("Cordova/California") and Cordova/Michigan (collectively the "Cordova Parties") have not caused or contributed to any contamination at the site. To the contrary, prior owners and operators deposited all of the contaminants in the soil and groundwater at the site before any of the Cordova Parties had anything to do with the site. Aerojet has never even owned or conducted operations at the site.

No Cordova Party had any contact with the site until 1977. By that time, the plume of contaminants had already spread off-site to a nearby creek and stabilized. Cordova/California, Aerojet's fully capitalized subsidiary, purchased the site from a federal bankruptcy trustee under a Stipulation and Consent Order with the State of Michigan. In the Stipulation and Consent Order, the State of Michigan promised that Cordova/California would never have any liability for the pollution left by previous owners of the site. Cordova/California would not have purchased the site without this promise from the State of Michigan.

Despite the promise of the State of Michigan, and despite the absence of any additional pollution at the site during the Cordova Parties' tenure at the site, the Cordova Parties now face a multi-million-dollar liability for remediation of pollution caused by a former subsidiary of CPC International ("CPC") and other unrelated parties. Both fundamental fairness and a proper application of state and federal law require that parties other than the Cordova Parties bear the costs of cleaning up pollution that the Cordova Parties did not create.

Facts

I. THE CORDOVA PARTIES DID NOT CONTRIBUTE TO CONTAMINATION AT THE SITE.

None of the Cordova Parties has ever disposed of hazardous substances or otherwise contributed to contamination at the site. This is the unrebutted testimony of state and federal regulators. (JA: 3258,

Hart, Tr at 66; JA: 3526, Truchan, Tr at 1720.)[1] All of the contaminants at the site today were deposited between 1957 and 1977, before Cordova/California acquired the site. A prior owner of the site, the Ott Chemical Company ("Ott"), contaminated the site by dumping hazardous substances into unlined disposal lagoons and into area waterways. (Pet. App. 60a-61a.) Without a lining in the disposal ponds, the hazardous materials continuously seeped directly into the ground and groundwater at the site. (JA: 1951, Water Resources Commission Report dated 3/22/66; JA: 1996, 2000, Minutes of September 9, 1966, Ott Board of Directors Meeting at 5.) After just 18 months of operation, Ott degraded the groundwater from its initially "excellent" quality (JA: 1782, August 20, 1957, MSU Department of Agricultural Chemistry letter) to quality so poor that some pollutants were already at "[t]oxic, possibly fatal" levels. (JA: 1783, February 13, 1959, Ott memorandum.) The site's subsequent owner, the Story Chemical Company ("Story"), also contributed to the contamination, but the worst contamination occurred between 1957 and 1969, when Ott owned the site. (Pet. App. 60a-61a; JA: 2568, Keck Report Abstract at i-ii.) Chemicals used by Ott both before and during CPC's involvement with Ott, and chemicals used by Story had contaminated the ground and groundwater at the site well before Cordova/California purchased the property in 1977. (Pet. App. 60a-61a; Tx 1219; JA: 2413, July 2, 1976, Yohalem memorandum at 1.)

The testimony of state and federal investigative personnel confirms that the Cordova Parties did not contribute to the site's contamination. (JA: 3417-3418, Ostrodka, Tr at 43-44 (never determined that any of the hazardous materials discovered at the site were generated by Cordova); JA: 3258, Hart, Tr at 66 (no information that Cordova placed hazardous substances at the site); JA: 3526, Truchan, Tr at 1720 (no contamination resulted from the Cordova operations at

[1] The Court of Appeals Joint Appendix ("JA") encompasses eleven volumes. References to the Joint Appendix provide the relevant page number of the testimony or document cited.

the site); JA: 3494-3495, Shauver, Tr at 1785-86 (Cordova had not caused the problem, and in fact funded part of the cleanup).) In the words of James Truchan, Michigan Department of Natural Resource's ("MDNR") former Division Chief in Charge of Michigan Superfund Sites: "From all the information I have, during the time that Cordova operated, they operated in an environmentally sound manner, and their waste was properly handled and disposed of . . . . The waste that is causing the problem on that Site came from the Ott-Story era." (JA: 3179-3180, Truchan Deposition at 75-76.)[2]

The district court also recognized that the Cordova Parties operated in an environmentally safe manner and so found as a matter of fact under Fed. R. Civ. P. 52:

> During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

(Pet. App. 62a.) There is no evidence to the contrary.

[2] Mr. Truchan further stated that "any infractions would have been brought to my attention" as the person in charge of civil litigation for MDNR. (JA: 3185, Truchan Dep. at 277.)

II. CPC KNEW ABOUT AND EXPLOITED OTT'S ENVIRONMENTAL ABUSES.

A. Before It Acquired Ott, CPC Knew About Ott's Environmental Abuses.

CPC purchased Ott in 1965.[3] CPC took over Ott with full knowledge of the serious contamination Ott created at the site. (JA: 3427, Ott, Tr at 663; JA: 1785, 1791-1792, March 19, 1965, Ott Board Minutes at 7.) As the late James Eiszner, CPC's former president and CEO, attested: "I know that members of CPC were aware of the contamination on the site." (JA: 2910, Eiszner Deposition at 302.) CPC's knowledge of Ott's polluting activities dates back at least to 1963 when CPC's Chief Executive Officer and Chairman of the Board, Alexander McFarlane, began participating in governing Ott as a member of Ott's Board of Directors. (App. 64a; JA: 2756, 2762, February 22, 1963 Ott Board Minutes at 7; JA: 3388, Miller, Tr at 371.) In spite of Ott's environmental abuses, McFarlane recommended that CPC purchase Ott to integrate Ott's people into the CPC organization, obtain leadership for CPC's research efforts, and gain a foothold in the chemical business. (App: 64a; JA: 3265-3266, Hellman, Tr at 1297-98; JA: 1923, February 21, 1966, "Philosophy Behind Acquisition of Ott.")

B. Improper Waste Disposal Continued Throughout CPC's Tenure at Ott and the Volume of Waste Grew From the Influx of CPC Dollars.

After the takeover, CPC permitted Ott to continue the same environmental policies and abuse Ott had pursued before CPC assumed control. Most of Ott's disposal practices, including unlined lagoon disposal, continued unabated. This unchecked disposal of chemical

[3]To distinguish the Ott Chemical Company as it existed before CPC's 1965 acquisition from CPC's wholly-owned subsidiary, Ott will at times be identified as "Ott-I" or "Ott-II."

waste into unlined lagoons was the principal source of contamination at the site. (Pet. App. 60a-61a.) The worst contamination at the site occurred from 1957 to 1969, a period spanning most of CPC's operation of Ott. (JA: 2568, November 10, 1977, Keck Report Abstract at i-ii; JA: 2196, June, 1967 Supporting Papers for CPC Board of Directors.) As the District Court summarized, the egregious waste disposal practices extended throughout CPC's ownership of Ott and were not limited to unlined lagoon disposal. (Pet. App. 60a-61a.) Employees of Ott testified that Ott's waste disposal and pollution control policies during CPC's control were "very, very lax." (JA: 2845, Cregg Deposition at 39.)

When CPC took over Ott in 1965, CPC pumped millions of dollars into expanding Ott's production facilities (Pet. App. 66a-67a; R:84, CPC July 12, 1990, Summary Judgment Brief at 10) but did not address the resulting magnification of Ott's disposal problems. As Ott grew from the influx of CPC dollars, waste production also grew. (Pet. App. 67a ("CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons.").) The disposal lagoons expanded to accommodate the increased volume of waste water. (Pet. App. 67a.)[4] Throughout this period of expanding waste volume, CPC pushed Ott to delay addressing pollution problems. (Pet. App. 75a-76a; JA: 2189, March 28, 1967, Eiszner letter, ("Rick [Williams of CPC] feels that delaying tactics are almost always advisable.").)

[4]JA: 733, UF at ¶¶ 52, 53; JA: 3434-3437, Peterson, Tr at 460-63 (Waste lagoons enlarged, additional lagoons added, and the company continued to use the unlined disposal lagoons even after installation of an equalization basin in 1968); JA: 3499-3500, St. Martin, Tr at 153-54 (As Ott-II added more buildings and products, the company generated more waste and added more lagoons); JA: 3215 Burt, Tr at 1039; JA: 2025, September 20, 1966, meeting notes ("Plant expansion in early summer increase of 30% waste.").

Throughout the CPC era, Ott-II spilled thousands of gallons of hazardous materials, buried hundreds of drums containing hazardous substances, intentionally disposed of millions of gallons of chemical waste into unlined lagoons, and used environmentally harmful, though inexpensive, disposal methods. (Pet. App. 60a-61a; JA: 3322-3324, Hoover, Tr at 210-11, 240 (hundreds of drums buried); JA: 3554, Yost, Tr at 768 (hundreds of leaking drums); JA: 3501-3502, St. Martin, Tr at 161-62 (Chemical spills near the company railroad spur turned the sand blue).) Drums containing methyl isocyanate leaked onto the ground and created fumes that stung employees' eyes. (JA: 3545-3546, Whitaker, Tr at 187-88.) The wastewater collection tank overflowed once a week, spilling 200 to 500 gallons of waste. (JA: 3543-3544, Whitaker, Tr at 183-84.) Employees took drums of waste to a pit, punched holes in the drums with a fire axe, and allowed the waste to drain into the pit. (JA: 3319-3321, Hoover, Tr at 207-09; JA: 3216-3217, Cregg, Tr at 395-96 ("We took a fire ax and knocked the bottoms and the tops and the sides out of [drums] to let them drain"); JA: 3218, Cregg, Tr at 400 (Caustic and other scrubber materials drained onto the ground at least once a week); JA: 3222-3223, Cregg, Tr at 412-13 (Leaking pipes formed stalactites of chemicals).) The equalization basin overflowed on a monthly basis and chemical wastes flowed approximately 200 yards before sinking into the ground. (JA: 3414-3415, Norris, Tr at 520-21.) Fifty to 300 gallons of insecticide spilled over the top of railroad cars approximately three times every week, saturating the ground around the rail cars with the chemicals. (JA: 3082-3084, Rake Deposition at 13-15; JA: 3075-3077, Peterson Deposition at 36-38.) Two or three times per week the pressure from chemicals inside 1,000-gallon kettles caused discs to rupture. The kettles "regurgitated" their contents onto the ground, saturating the ground and staining it purple. (JA: 3080-81, Rake Deposition at 10-11.) The evidence of environmentally irresponsible waste disposal during CPC's era is overwhelming.

C. CPC Actively Managed All Aspects of Ott's Business, Including Ott's Environmental Problems.

1. CPC Exerted Policy-making Control over Ott Through Its Scientific Operating Committee and Its Development Company.

After CPC took over the Ott Chemical Company, Arnold Ott moved into the CPC organization as chairman of CPC's Scientific Operating Committee. (Pet. App. 65a; JA: 2925-2926, Garber Deposition at 66-67.) In 1967, CPC replaced the Scientific Operating Committee with the CPC Development Company, an unincorporated division of CPC which "actively participated in and exerted control over policy-making at Ott-II." (Pet. App. 72a.) CPC Development Company oversaw the operation of CPC's technical subsidiaries as one of six "profit centers" within CPC which CPC used to better manage the profitability of CPC's separate operating units, including Ott. (JA: 734, UF at ¶ 65; JA: 2263, April 25, 1969, Harder and McKee memorandum.) The Development Company's primary function was to ensure that operating units met profit plans and complied with CPC policies. (Pet. App. 72-73a, ("the development company regularly reviewed Ott II and recommended changes on matters ranging from finances to personnel"); JA: 3424, Ott, Tr at 596; JA: 3460, Roberts, Tr at 898 (Responsible for managing Ott-II and the other research businesses for CPC); JA: 2263, April 25, 1969, CPC Bulletin).) The Development Company's board of directors functioned as the board for Ott and the other technical and research subsidiaries of CPC. (JA: 2920-2922, Garber Deposition at 35-37.)

CPC used the Development Company to manage Ott. (Pet. App. 72a-73a.) Beverly Warner, the president of CPC's Development Company, was "responsible for Ott at CPC," and visited the Ott-II site at least quarterly. (JA: 3552, Yost, Tr at 749.) Warner actually began using Ott as his own business experiment, making pricing decisions, production decisions, and scheduling decisions for the company. In

fact, he became so involved in Ott's day-to-day operations that, according to the former chief executive officer of CPC, "he almost ruined the company" with his "terrible, terrible management decisions." (Pet. App. 71a; JA: 2912-2913, Eiszner Deposition at 452-53.)

2. CPC's Own Director of Environmental Matters intervened in Ott's Affairs to Delay Environmental Solutions.

CPC placed G. R. D. (Rick) Williams in charge of handling the pollution problems for CPC, naming him Director of Environment/Energy for the entire multibillion dollar CPC organization. (JA: 2431-2437, 1975-1976 CPC Almanac at 10.) As the District Court noted, Williams "actively participated in and exerted control over a variety of Ott-II environmental matters." (Pet. App. 75a.)[5] CPC required Ott personnel to check with Williams (or other CPC officials) before answering questions about Ott's environmental compliance. (Pet. App. 75-76a; JA: 2268, July 11, 1969, Williams letter ("We answer questions that are not self-incriminating, but we do not volunteer information"); JA: 2281, June 26, 1970, CPC policy letter (CPC's president directing the CPC operating companies not to provide

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[5]Ironically, some CPC witnesses now suggest that the late Mr. Williams was incompetent. (JA: 2911, Eiszner Deposition at 330.) If these people actually felt that way about Mr. Williams while they were working with him, it did not prevent CPC from entrusting Mr. Williams with responsibility for all of CPC's worldwide pollution control programs and other environmental matters. CPC either trusted the competence of Mr. Williams while he was alive and moving up the ranks at CPC, or willingly entrusted environmental matters to an incompetent employee. In either case, CPC is properly responsible for the environmental problems related to Mr. Williams' activities.

Williams had a long term career at CPC, progressing through a series of executive positions. Beginning in 1966, Williams served as CPC's Director of Air and Water Programs and retired in 1979 as the Corporate Director of Environmental Control for CPC International Inc. (JA: 2262, March 3, 1969, CPC News Bulletin.)

information or access to files to any federal, state, or local government without prior approval from CPC's general counsel); JA: 2312, August 20, 1971, pollution procedures; JA: 2317, October 26, 1971, Williams memorandum (CPC requiring Ott-II personnel to check with CPC before responding to requests for information regarding Ott-II's polluting activities from citizens, public bodies, or the media).) A CPC official on Ott's Board directed Ott to contact Williams for help with Ott's disposal problems. (JA: 1996, 2004, 2017, September 9, 1966, Ott Board of Directors Meeting at 9, 22.) Ott's officers soon recognized that Williams felt "delaying tactics are almost always advisable" when dealing with regulatory authorities. (Pet. App: 75a; JA: 2189, March 28, 1967, Eiszner letter.)

As a result of Williams' direct participation in waste disposal discussions at Ott and with the Water Resources Commission, Ott-II dropped plans for proposing installation of a biological waste treatment facility. (Pet. App. 75a.) In the spring of 1966, Ott-II was under pressure from the state regulators to solve Ott-II's waste disposal problems. (JA: 1928, 1930, March 2, 1966, Arnold Ott memorandum, at 3.) In fact, the Executive Secretary of the Water Resources Commission, Mr. Oeming, had told Ott-II's representatives that their proposed schedule for addressing the groundwater discharge problems was "unconscionable," and threatened to close the plant down if Ott-II did not take rapid and concrete action. (JA: 3394, Newhof, Tr at 1071; JA: 3400-3403, Newhof, Tr at 1105-08; JA: 3243-3244, Gottlieb, Tr at 1502-03; JA: 1953, May 23, 1966, Gottlieb memorandum; JA: 1955, May 24, 1966, meeting notes.) Ott was more interested in a cheap solution than an effective one. (JA: 3403, Newhof, Tr at 1108 (Ott's consultant reporting to Ott that they were "working with the idea in mind that [they] had to have the absolutely cheapest solution"); JA: 1955, May 24, 1996 meeting notes.)

Williams advised Ott-II "that no mention be made of biological treatment facilities," in the presentation to the State Water Resources Commission. (Pet. App. 75a; JA: 2180-2182, December 1, 1966,

Williams Progress Report, at 3; JA: 3284, Hellman, Tr at 1364.) This was consistent with Williams' general policy of delaying waste disposal improvements (Pet. App. 75a-76a; JA: 2189), but contrary to the recommendation of Ott's own vice president of manufacturing and Ott's own consultants. (JA: 3253-3254, Gottlieb, Tr at 1527-28; JA: 2160, 2173, November 18, 1966, Ott Board Minutes, at 14; JA: 1987, September 9, 1966, Gottlieb Report to Ott Board of Directors, at 7; JA: 3405, Newhof, Tr at 1120-1126; JA: 3285-3286, Hellman, Tr at 1366-1367.) At the next meeting with state officials, Williams accompanied the Ott-II negotiators. As Williams recommended, Ott-II never presented the biological treatment plan proposed by Ott-II's own consultant. (JA: 2026, September 22, 1966, Gottlieb memorandum; JA: 2149, November 11, 1966, Eiszner memorandum (James Eiszner relaying the outcome of the meeting to Dr. Ott, and specifically referencing the cooperation of Williams in the evolution of the waste-disposal program, as "Corn Products' specialist in waste disposal").)

Ott never built a biological waste treatment facility for the site. (JA: 3286, Hellman, Tr at 1367; JA: 3404, Newhof, Tr at 1112.) Williams reported to his CPC superiors that while the consultant's programs had indicated "the necessity for a biological treatment facility by 1970," he hoped that by postponing presentation of the treatment option to state officials, Ott-II might be able to avoid the $350,000 expense of treating its own waste before discharging it. (JA: 2180, 2182, December 1, 1966, Williams Progress Report, at 3.) Williams managed to save money for CPC and its operating units by delaying environmental management at Ott.

3. CPC Officials Assumed Responsibility for Other Environmental and Regulatory Matters at Ott.

CPC remained directly involved in Ott environmental regulatory matters. Through Williams, CPC counseled Ott personnel on everything from how to fill out environmental survey forms to how

to handle regulatory visits (Pet. App. 75a-76a), and conducted overall cost benefit analyses regarding Ott's entire pollution response programs. (JA: 2251, June 6, 1968, Williams memorandum; JA: 2180, December 1, 1966, Williams Progress Report.) Ott personnel received instructions to notify CPC of plant visits by governmental agencies. (Pet. App. 75a; JA: 2258, November 27, 1968 safety committee meeting minutes; JA: 2251, June 6, 1968, Williams memorandum.) CPC instructed Ott personnel to delay responding to requests for information from federal agencies. (Pet. App. 75a; JA: 2313, September 22, 1971, Williams letter ("We have . . . not as yet made a decision as to whether or not we should fill it out . . .).) Ott personnel in charge of disposal and compliance matters looked to CPC personnel for instructions on how to deal with the Corps of Engineers and the United States Environmental Protection Agency. (JA: 2348, February 22, 1972, Nance letter ("please review this and determine what action I should take."); JA: 2347, February 14, 1972, Nance letter ("The last word I had from you was that we were not to reply to this report. Does this still hold and, if so, what should we do?").)

CPC's legal counsel and Executive Vice President also became intimately involved in making arrangements with the State of Michigan for Ott's continued discharge of waste materials. (Pet. App. 76a.) Members of CPC maintained active involvement in constructing Ott's wastewater discharge agreements. Hanes Heller, a member of CPC's legal staff, outlined his concerns to the President of CPC's Development Company: "If CPC is to guarantee Ott's obligations, approval should be obtained from the requisite authority, whether the Board of Directors or Mr. Harder [Chairman and CEO of CPC]." (JA: 2291, 2293-94, November 4, 1970, Heller memorandum at 3-4.) Heller also personally intervened in Ott's discussions with the Water Resources Commission regarding Ott's persistent inability to control its wastes. (JA: 2303, January 6, 1971, Nance letter (Heller participating in telephone conferences with Water Resources Commission); JA: 2306, January 13, 1971, Heller memorandum; JA: 2291, November 4, 1970, Heller memorandum; JA: 2279, May 26, 1970, Nance letter (asking Lundy,

CPC's in-house counsel, to review waste disposal agreement); JA: 2280, June 22, 1970, Nance letter to Hanes Heller of CPC regarding stipulation from Michigan Water Resources Commission ("I will depend on your comments to determine if this is suitable."); JA: 2290, October 22, 1970, Nance letter to Wascher at CPC regarding waste disposal negotiations with the Water Resources Commission).)

D. CPC Received Millions of Dollars When It Sold Ott-II to Story.

In 1971 and 1972, CPC engineered a transaction in which Ott-II sold its assets and liabilities to Story for approximately $6.6 million in cash and a $4 million note in the form of convertible subordinated debt. (Pet. App. 78a; JA: 2407, March 15, 1976, Agreement between CPC and Story.) Ott-II changed its name to Four Lakes Chemical Company ("Four Lakes") (Pet. App. 78a), and transferred the $4 million note to CPC as a dividend. (JA: 2380, August 28, 1973, Wills memorandum.) Moreover, even though CPC executives were well aware of the serious environmental liability at the site, CPC also removed the $6.6 million cash payment from Four Lakes and left Four Lakes as a shell corporation with no assets. (JA: 2380, August 28, 1973, Wills memorandum; JA: 3351-3353, Knief, Tr at 1489-92.)

For six months following the sale, CPC actually "operated the business for Story." (JA: 2378, August 16, 1973, Knief memorandum.) To protect CPC's equity stake in Story, Beverly Warner, president of the CPC Development Company and former Ott-II board member, accepted a position on the Story board of directors. (JA: 2376, July, August, 1972, "Blotter" article; JA: 2727, August 15, 1977, Order Rejecting Executory Contract.) CPC retained its interest in Story for two more years, and in 1976, CPC agreed to cancel Story's outstanding debt in exchange for an agreement that Story would not hold CPC liable for Story's mounting obligations. (JA: 2407, March 15, 1976, Agreement between CPC and Story; JA: 2392, December 4, 1975, CPC telephone message notes (evidencing concern at CPC regarding potential litigation

over Story).) Later that year, Story filed for bankruptcy. (JA: 752 UF at ¶ 170.) Maurice Edelman, a bankruptcy trustee for Story's creditors, assumed title to the site and attempted to find a buyer. (Pet. App. 78a.)

III. THE STATE OF MICHIGAN INDUCED CORDOVA/CALIFORNIA TO ACQUIRE THE SITE FROM A BANKRUPTCY TRUSTEE BY PROVIDING A WRITTEN RELEASE FROM ALL POTENTIAL LIABILITY TO ANY GOVERNMENTAL AGENCY FOR CONTAMINATION LEFT BY PRIOR OWNERS AND OPERATORS OF THE SITE.

After Story filed for bankruptcy in 1976, the bankruptcy trustee succeeded to title of the site by operation of law. The trustee attempted to sell the property to various parties. Because Ott and Story had caused such serious contamination problems, no purchasers could be found. (JA: 2472, April 11, 1977 MDNR letter; Tx 970, April 5, 1977 Uniroyal Chemical rejection letter; JA: 746, UF at ¶¶ 134, 136-137, 159.)

The State of Michigan became heavily involved in trying to sell the property because it realized that the State would bear the entire cost of cleaning up the contamination left by Ott and Story if no purchaser were found. (Pet. App. 81a; JA: 748, UF at ¶ 144; JA: 2554, October 13, 1977 MDNR memorandum; JA: 2982, Hogarth Deposition at 114.) A purchaser would not only provide additional funding to help pay for the cleanup but also make the site productive by providing jobs and a better tax base for the area. Accordingly, MDNR and other branches of the State sought to consummate a sale by encouraging prospective purchasers, including Cordova/California, to purchase the site. Even Michigan's Governor became involved. (JA: 2567, October 19, 1977 Milliken letter.)

Cordova/California considered purchasing the site as a possible location for a new ethylenimine ("EI") manufacturing operation and began negotiations with State officials. (JA: 761, UF at ¶ 195.) The Ott/Story contamination became a central negotiating item. Cordova/California was absolutely opposed to accepting financial responsibility for contamination caused by others. Accordingly, Cordova/California insisted that, before any purchase, the MDNR agree on precisely what Cordova/California would have to pay or do to obtain a complete release from all relevant governmental agencies for past contamination caused by Ott and Story. (JA: 3165, Swanson Deposition at 127.) State officials recognized that to induce Cordova/California to purchase the site and contribute to the cleanup, the State would have to grant Cordova/California protection from any liability related to the existing contamination. (JA: 3513-3514, Truchan, Tr at 1660-61; JA: 3316, Hogarth, Tr at 1908 ("It was obvious that Cordova would not enter the agreement if it had any responsibility for groundwater cleanup.").)

On October 13, 1977, the parties signed the Stipulation and Consent Order as their final agreement.[6] (Pet. App. 83a; JA: 2550, Stipulation and Consent Order.) Under the agreement, Cordova/California agreed to purchase the site, to pay $600,000 to MDNR, and to neutralize phosgene left at the site by Story. (Pet. App. 85a-86a, 88a.) Neutralization of the phosgene gas was the State's highest cleanup priority for the site because the gas created a serious health and safety risk to the community. (JA: 3506, Truchan, Tr at 1651; JA: 3468, 3479, Rustem, Tr at 1573, 1631-1632; R:404, Hogarth, Tr at 1895-1896; JA: 2554-55, October 13, 1977 DNR memo at 2 ("The number 1 priority would be destruction of the phosgene.".) In exchange, the State agreed to assume legal and financial responsibility for all other cleanup efforts and to release Cordova/California from all potential liability to *any* government agencies, including the MDNR. (Pet. App. 87a.)

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[6] At the time of the purchase, Cordova/California was a separately incorporated subsidiary of Aerojet. Cordova/California later formed its own subsidiary corporation, Cordova/Michigan, to conduct the actual operations at the site.

The Stipulation and Consent Order precludes MDNR from bringing any action against the Cordova Parties based on the contamination caused by others at the site. MDNR specifically agreed to assume the risk of underestimating the problems at the site. (JA: 2550, Consent Order, p. 2, ¶ 6.) The agreement applies broadly to all potential liability arising out of the prior contamination:

> 6. . . . The Cordova Chemical Company shall not have any liability in the event that the said $600,000 is not in fact sufficient for the intended purposes . . .
>
> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation the creation, maintenance, and operation of any purge wells.
>
> . . .
>
> 8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwaters or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation, or its predecessors, or arising out of operations of the Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order,

> whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.

(JA: 2550, Consent Order ¶¶ 6, 8.) The head of MDNR and the office of Michigan's Attorney General signed on behalf of the State. The Michigan Court of Appeals has ruled that this agreement obligates the State of Michigan to reimburse the Cordova Parties for any liability they incur in this action. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App. 144, 536 N.W. 2d 860 (1995). The Michigan Supreme Court has denied the State's request for leave to appeal. *Cordova Chemical Co. v. Department of Natural Resources*, 453 Mich. 901, 554 N.W. 2d 319 (1996).

IV. CORDOVA/CALIFORNIA AND ITS SUBSIDIARY, CORDOVA/MICHIGAN, OPERATED THE SITE RESPONSIBLY AND DID NOT ADD NEW CONTAMINATION TO THE SITE OR EXACERBATE CONTAMINATION LEFT BY OTHERS AT THE SITE.

A. Cordova/California and Cordova/Michigan Operated With More Than Adequate Capitalization of Millions of Dollars in an Ultimately Unsuccessful Effort to Create a Viable Business at the Site.

Cordova/California operated as an Aerojet subsidiary with millions of dollars in capital. (JA: 752, UF at ¶ 171.) It used a large portion of the capital to improve the site. The total purchase price for the site was approximately $2.5 million. This price included payment of more than $800,000 to the National Bank of Detroit ("NBD") at a

foreclosure sale[7] and $600,000 to the State of Michigan to fund cleanup activities. (JA: 2986, Howes Deposition at 29-32.) As a part of the purchase, Cordova/California also addressed the State of Michigan's most pressing environmental concern by neutralizing phosgene gas left by prior owners and operators of the site. (JA: 768, UF at ¶ 233.) After the purchase, Cordova/California had to spend millions more to prepare the site for operations because of the site's poor condition. (JA: 2992-2993, Howes Deposition at 43-44 ("[T]here was just an unbelievable gross mess that took many months to diffuse . . . It took quite awhile to get . . . the place cleaned up."); Tx 1339, October 20, 1989 *de minimis* proposal at 5-6.) The total amount spent before commencement of operations was approximately $19,000,000. (*Id.*)

On November 2, 1978, Cordova/California incorporated its own subsidiary corporation, Cordova/Michigan, to conduct operations at the site. (Pet. App. 94a; JA: 763, UF at ¶ 208.) Cordova/California and Cordova/Michigan were each capitalized with millions of dollars (Pet. App. 93-94a) in an effort to make the Michigan operation a viable enterprise which could "stand on its own feet." (JA: 3116, Simmons Deposition at 100; JA: 3009, Matthews Deposition at 9; JA: 3068, Payton Deposition at 22.)[8] They were bona fide commercial ventures launched with strong financial support. Unfortunately, the ventures did not succeed commercially. An unsuccessful commercial venture by a subsidiary does not and should not expose its owner to enormous liability for contamination caused by others.

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[7] An additional $500,000 payment to NBD was not required because Cordova never made any profits at the site. (Tx 1013, October 11, 1977, Agreement with NBD.)

[8] Cordova/California was capitalized in 1977 with $10,000 in common stock and $7,161,630 in additional paid-in capital. (Pet. App. 93a; JA: 752, UF at ¶ 171.) Cordova/Michigan was capitalized in 1978 with $250,000 in common stock and $2,843,226 in additional paid-in capital. (Pet. App. 94a; JA: 753, UF at 175; R:184 at Exhibit 34, Cordova Defendants' responses to CPC's Interrogatories Nos. 40, 41.)

B. Cordova/California and Cordova/Michigan Added No New Contamination to the Site and Did Not Exacerbate Contamination Left by Others at the Site.

The record demonstrates that all contamination at the site was caused solely by the companies that owned and operated the site before the bankruptcy trustee succeeded by operation of law to ownership of the site in 1977.[9] Evidence of releases from unlined seepage lagoons, chemical spills, leaking drums and various other sources during operation of the facility by those prior owners is overwhelming. (Pet. App. 60a-61a.) As early as 1967, in a capital expenditure request to CPC's Board of Directors, CPC itself conceded that its Ott subsidiary was polluting the site. (JA: 2196, June, 1967, supporting papers for CPC Board of Directors.)

In stark contrast, there is no evidence that Cordova/Michigan, Cordova/California or Aerojet caused any pollution at the site. Cordova/California and Cordova/Michigan ran environmentally sound operations. This fact is supported not only by the testimony of former and current employees of Cordova/California and Cordova/Michigan, but also by the testimony of officials for both government agencies that have made CERCLA claims against the Cordova Parties in this case. (JA: 3180, Truchan Deposition at 76; JA: 2942, Hart Deposition at 90-91, 95-102, 110-113.) The Cordova Parties simply did not cause contamination at the site.

The Cordova Parties also acted reasonably in responding to contamination by others at the site. Before agreeing to purchase the property, Cordova/California reached an agreement with the State of Michigan and MDNR that addressed all the environmental problems at the site and assigned responsibility for abatement and remedial actions.

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[9]No one has alleged that the bankruptcy trustee caused or contributed to the release or threatened release of hazardous substances at the site.

(JA: 2550, Consent Order; JA: 3141, Swanson Deposition at 57-59.) Cordova/California satisfied its obligations under the agreement by removing phosgene which had been left on site and by providing the agreed-upon funds to the State of Michigan. (Pet. App. 90a; JA: 2573, January 4, 1978, correspondence from MDNR; JA: 2579, February 16, 1978, correspondence to Hogarth; Tx 1130, correspondence to MDNR and canceled checks). Cordova/California also removed contaminated sludge left in the equalization basin by the previous owners. (Pet. App. 62a.) Cordova/Michigan disposed of abandoned drums that the State failed to remove. It also demolished and disposed of contaminated buildings and equipment left by the previous owners before commencing any operations at the site. (R:187 at Exhibit Q, Response to CPC's Interrogatories at 41; Tx 1364, Peden Affidavit, ¶ 5.) All of these actions were taken with due care and in the interest of improving the environmental condition of the site.

Moreover, the Cordova Parties did nothing to worsen the existing groundwater contamination at the site. The contaminated groundwater plume at the site had stabilized by 1976, before any of the Cordova Parties had any contact with the site, as the trial court had determined in prior litigation involving CPC's responsibility for the contamination emanating from the site. (JA: 2736-2744, Findings of Fact from *Gollach v. CPC Int'l, Inc.*, W.D. Mich. August 17, 1981, at ¶ 28.) The shape of the plume has not significantly changed since that time. (JA: 2803, February 7, 1983, Correspondence from CPC's counsel to U.S. EPA at 2 ("The plume is laterally stable.").) Thus, any natural migration that occurred in this case is limited to movement of water molecules through an already-defined and stationary groundwater plume.

SUMMARY OF ARGUMENT

The court of appeals and all parties to this case recognize two separate and distinct potential theories of liability for parent

corporations under § 107(a)(2). The first is a derivative liability theory under applicable corporate law principles of veil-piercing. No party is challenging before this Court the propriety of the Sixth Circuit's conclusion that neither Aerojet nor CPC is properly liable on this derivative theory. The second theory of liability recognized by all parties and the Court of Appeals is direct statutory liability for the parent company's own conduct. The real question before this Court is under what circumstances the direct liability contemplated by the language of the statute attaches to a parent corporation.

The United States advances the participation and control standard created by the district court. This test, however, improperly isolates a portion of the complete statutory text and fails to limit direct liability to parties who actually contributed to pollution at the site. This test also fails to realize the conceptual difference between direct and derivative theories of liability, since the United States, like the district court, asserts that direct liability under Section 107(a)(2) can attach to a parent corporation solely on the basis of its relationship with its subsidiary corporation. The Sixth Circuit properly rejected this proposed standard of direct operator liability as nothing but a federalized veil-piercing test without any basis in the statutory text.

A proper test for direct liability under § 107(a)(2) must be based upon the plain language of the statute. Section 107(a)(2) of CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607. Liability under the plain terms of the statute is thus based upon the relationship between a potentially responsible person, a facility owned or operated by such person, and a time of disposal of hazardous substances. A test for direct liability that encompasses all of these elements is mandated by both the plain terms of the statute, and CERCLA policy. As the United States notes, Congress's intent in enacting CERCLA was to ensure that those responsible for polluting bear the costs of their actions. This policy is not served by a test that imposes liability on a parent

corporation without regard to its involvement in the pollution that occurred at the facility.

The Cordova Parties cannot be liable under § 107(a)(2) because there was no disposal of hazardous substances during the time that Aerojet and its subsidiaries were involved with the site. The district court noted that two hazardous chemicals used by the Cordova Parties are present in the soil and groundwater at the site, but the district court made no finding that it was the Cordova Parties that disposed of these substances. To the contrary, the record evidence indicates that such chemicals were disposed of by previous owners and operators of the facility, not by the Cordova Parties. The district court also referenced the possibility of the continued natural migration of hazardous materials dumped at the site by previous owners and operators, but such passive migration is insufficient as a matter of law to constitute disposal within the meaning of § 107(a)(2). Since the Cordova Parties had no involvement whatsoever with the disposal of any hazardous substances at the facility, they cannot be liable under § 107(a)(2).

CPC, in contrast, should be held directly liable since it was directly involved in operating facilities at its subsidiary's site at a time of continuing disposal of hazardous substances. The district court found that CPC was directly involved in the environmental and regulatory affairs of its subsidiary, controlling "specific policy matters including hazardous waste disposal." (Pet. App. at 74a-76a.) The District Court further found that CPC was involved in both major policy decisions and day-to-day operations at the site. (Pet. App. at 111a.) CPC's direct statutory liability turns not on its overall relationships with a subsidiary -- an issue properly governed by state corporate law -- but on its own conduct at the site.

Finally, even if the Cordova Parties were otherwise liable, the third-party defense provided by § 107(b)(3) of CERCLA would require dismissal of the claims against them in any event. The Cordova Parties meet all of the requirements for application of § 107(b)(3) third-party

defense, in that contamination at the site was caused solely by third parties, the Cordova Parties had no disqualifying contractual relationship with the parties that did cause the contamination, and the Cordova Parties exercised reasonable care in their activities at the site.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT NEITHER CPC NOR AEROJET IS DERIVATIVELY LIABLE FOR ITS SUBSIDIARY'S CONDUCT BECAUSE THERE IS NO BASIS FOR PIERCING THE CORPORATE VEIL UNDER APPLICABLE STATE LAW.

A parent corporation may be derivatively liable for a subsidiary's obligation where circumstances justify piercing the corporate veil under applicable state corporate law. This general principle of corporate law applies to a subsidiary's CERCLA liability as well. The Sixth Circuit properly concluded that the record does not support derivative liability for either CPC or Aerojet under applicable state corporate law of veil piercing. (Pet. App. 15a-17a, 20a-22a.) The government does not contest this ruling before this Court.

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED A DIRECT LIABILITY THEORY FOR PARENT CORPORATIONS DISTINCT FROM AND INDEPENDENT OF DERIVATIVE LIABILITY UNDER STATE CORPORATE LAW.

The court of appeals and all parties to this case recognize the potential for the direct liability of a parent corporation under § 107(a)(2). Twice in its opinion the court of appeals noted that, in addition to derivative liability through veil piercing, a parent

corporation could also be liable under § 107(a)(2) if it directly operated the facility through its own actions, either independently or along with its subsidiary. (Pet. App. 12a, 17a.) Indeed, the majority took the dissent to task for suggesting that its opinion held that a parent corporation could not be directly liable under § 107(a)(2) as an operator of a facility owned by its subsidiary, a characterization it called "mistaken." (*Id.* at 17a, n. 5.) The United States agrees that the statute creates a direct liability theory analytically distinct from derivative liability through veil-piercing. (U.S. Brief at 34). CPC also acknowledged before the court of appeals the viability of a direct liability theory. (Supplemental Brief of CPC in the Sixth Circuit, October 30, 1995, at 14 n.5). The Cordova Parties have maintained this position since the inception of the case.

All parties, then, are on common ground in recognizing two distinct pathways of potential liability for a parent company under CERCLA § 107(a)(2). This is the same conclusion reached by every court of appeals to address the matter. (*See* Cordova Parties' Brief Opposing Petitions at 6-8). The real question for this Court, then, is not whether a parent corporation can be directly liable under CERCLA, but under what circumstances such direct liability attaches. It is on this question that the positions of the parties and the court of appeals diverge.

The government adopts the participation and control standard created by the district court, and in so doing commits two errors. First, it isolates a portion of the complete statutory text and neglects to limit direct liability to parties who actually contributed pollution to the site. Second, it fails to offer the Court what it promises: namely, a theory of liability analytically distinct from the corporate law of veil-piercing. Instead, like the district court, the government merely repaints the veil-piercing analysis in federal colors. Indeed, in imposing direct liability on Aerojet, the district court relied on exactly the same reasoning and factual points it used in the veil-piercing analysis. (Pet. App. 124a.) This is not an analytically distinct theory of liability.

The need for a truly distinct theory of direct operator liability was the core insight of the court of appeals. When liability depends upon the overall relationship between a parent and a subsidiary corporation, the proper legal framework is and ought to be supplied by applicable state law principles of corporate law. Accordingly, the Sixth Circuit properly rejected a direct federal theory of liability that would, in effect, create a federal common law of corporations. Instead, the Sixth Circuit properly concluded that direct operator liability must depend upon the relationship between the parent corporation and the polluting facilities in question. Where a parent corporation actually operates the polluting facilities of its subsidiary, then direct liability may be imposed regardless of whether the overall relationship between the two companies warrants veil-piercing under applicable state law.[10] Otherwise stated, a parent corporation may incur direct liability under CERCLA through its own actions at a subsidiary's facilities without subjecting itself to derivative liability under the veil-piercing provisions of the applicable state law.

The test for direct statutory liability must begin with the words of the statute. Section 107(a)(2) of CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607. Thus, liability under the plain terms of the statutory language is based upon the relationship among a person (including a corporation), a facility owned or operated by the person,

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[10]The Cordova Parties believe the court of appeals correctly drew a sharp, analytical distinction between derivative and direct theories of liability, but the Cordova Parties do not agree that the court of appeals correctly applied the direct liability theory to CPC. Even CPC acknowledged in the court of appeals that a parent corporation can be directly liable if it is involved in day-to-day operations at a subsidiary's facility. (Supplemental Brief of CPC in the Sixth Circuit, October 30, 1995, at 14 n.5). This is precisely what the district court found CPC had done, and there is overwhelming record support for the district court's conclusion. (Pet. App. 111a; *see also infra* at 9 to14.)

and a time of disposal of hazardous substances. This required nexus between the potentially responsible person and the pollution at the facility is not only mandated by the statutory text, but is also consistent with the most basic policies underlying CERCLA. Congress enacted CERCLA, as the United States repeatedly states, to ensure that those responsible for polluting bear the costs of their actions. (U.S. Brief at 4-5 (quoting S. Rep. No. 848, 96th Cong., 2d Sess. (1980) at 13; H.R. Rep. No. 1016, 96th Cong. 2d Sess. Pt. I (1980) at 17). Thus, liability under § 107(a)(2) must be premised not simply upon a potentially responsible corporation's relationship with another corporation that conducts business at the facility, or even with its relationship to a facility in the abstract. Liability must be premised upon the corporation's relationship to site facilities at "the time of disposal of . . . hazardous substances." The United States sidesteps this crucial limitation of the statutory test, urging that liability be imposed on Aerojet based solely upon its relationship with its subsidiary. This is not the proper focus of the statutory test. Section 107(a)(2) makes a corporation liable for operating a polluting facility, not for operating a subsidiary.

III. THE CORDOVA PARTIES ARE NOT DIRECTLY LIABLE UNDER SECTION 107(a)(2) BECAUSE NONE OF THEM OPERATED FACILITIES AT THE TIME OF DISPOSAL.

The Cordova Parties cannot be liable under § 107(a)(2) because there was no disposal of hazardous substances during the time that Aerojet and its subsidiaries were involved with the site. This is true even if this Court adopts the participation and control test urged by the government because § 107(a)(2) imposes liability only for owning or operating facilities *at the time of disposal*. There was no disposal during the tenure of the Cordova Parties.

The district court recognized that Aerojet and its subsidiaries did not pollute the site. "During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras . . . Cordova/Michigan discharged chemical waste through off-site disposal." (Pet. App. 62a.) The record contains no evidence of any new disposal of hazardous materials during the tenure of Aerojet and its subsidiaries. Nevertheless, the district court found that such "disposal" had occurred for purposes of liability under § 107(a)(2) based upon two theories. First, the district court noted that "two hazardous chemicals used in small amounts by Cordova/Michigan--benzene and 1, 2 dichloroethane ("1, 2-DCA")--are in the soil and groundwater at the site." (Pet. App. 62a.) Second, the district court referenced the possibility of the continued natural "migration" of hazardous materials dumped at the site by the site's previous owners. (Pet. App. 61a-62a.) Neither of these circumstances amounts to a "disposal" of hazardous substances for purposes of § 107(a)(2) liability.[11] The district court was mistaken.

A. Cordova/Michigan Did Not Dispose of 1,2 DCA or Benzene at the Site.

The district court's first basis for liability erroneously equates "use" with "disposal." Cordova/Michigan did use 1, 2 -DCA in its manufacturing processes, but there is not a shred of evidence in the voluminous record that it ever disposed of 1, 2-DCA, and that is the reason no party has cited any evidence to support that proposition. Benzene was left on site by previous occupants and disposed of by

[11]The court of appeals did not directly resolve this issue, but it did indicate that there did not appear to be any disposal during the tenure of the Cordova Parties and it directed the district court to reconsider the question on remand. (Pet. App. 21a-22a.)

Cordova/Michigan *off site*. Both of these chemicals, benzene and 1, 2-DCA, were used and spilled extensively by the site's prior owners and operators. Both chemicals were present in the site's groundwater before Cordova/California acquired the site. (Tx 1487 (November 25, 1968 Ott II Safety Inspection Memorandum); Tx 1504 (April 10, 1973 Story Testing Memo); Tx 1116 (November 28, 1978 Memo Regarding Groundwater Constituents).) While the use by a party of a hazardous chemical found in the soil and groundwater at a site may be evidence of a "disposal" of such chemical by the party if the party is the only one that has ever used the chemical at the site, *see, e.g., Sunnen Products Co. v. Chemtech Industries, Inc.*, 658 F. Supp. 276 (E.D. Mo. 1987), that is not the case here. The record simply does not support the conclusion that Cordova/Michigan "disposed" of benzene or 1, 2-DCA at the site.

B. Natural Migration In Groundwater Of Contaminants Deposited By Others Is Not Statutory Disposal.

The continued natural migration of contaminants left in the ground by others is not "disposal" of hazardous substances within the meaning of § 107(a)(2). Two courts of appeals have recently ruled, consistent with the Cordova Parties' position, that such passive migration is not "disposal" under CERCLA. *See ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996). These rulings are consistent with the text, structure and purposes of CERCLA. The Cordova Parties cannot be held liable under § 107(a)(2) because no disposal of hazardous substances occurred at the site during the tenure of its subsidiaries.

The Third Circuit Court in *CDMG* noted that the definition of disposal begins with "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water." 42 U.S.C. § 6903(3). The *CDMG* court

further noted that courts that have ruled that passive migration can constitute disposal have generally focused on the words "leaking" and "spilling" in that definition, since these terms do not necessarily suggest active human conduct. *CDMG*, 96 F.3d at 714 (citing the district court's ruling in this case, *CPC International, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1278 (W.D. Mich. 1991) and *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd.* 688 F.2d 204 (3d Cir. 1982)). In the context of this definition, however, "leaking" and "spilling" should be read to require active human conduct. Both terms also have meanings that require active human conduct. *CDMG*, 96 F.3d at 714 (citing Webster's Dictionary definitions of these terms, which set forth that "leak" can be defined as "to permit to enter or escape through a leak," and "spill" can mean "to cause or allow to pour, splash, or fall out"). "Meaning derives from context, hence the constructional canon *noscitur a sociis*, which states that one may infer meaning by examining the surrounding words. The words surrounding 'leaking' and 'spilling'—'discharge,' 'deposit,' 'injection,' 'dumping,' and 'placing'—all envision a human actor." *Id.* It may be inferred then that Congress intended that disposal always requires active human conduct. *Id.; see also* Robert L. Bronston, Note, *The Case Against Intermediate Owner Liability for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609, 616 (1994). Natural migration occurs without active human conduct.

Moreover, even if disposal does not always require active human conduct, the passive migration that occurred here cannot constitute disposal in any case. Although the terms "leaking" and "spilling" also have passive definitions that do not necessarily require active human conduct, "neither word denotes the gradual spreading of contamination." *CDMG*, 96 F.3d at 714. A common passive definition of "leak" is "to enter or escape through a hole, crevice, or other opening." *Id.* This definition requires that a substance "leak" from an opening, as in the escape of waste through a hole in a drum or tank. *Id.* No such "leak" occurred here. Likewise, although "spilling" also has passive definitions, none would apply to the passive migration in

groundwater of contaminants left by others at issue here. "Passive definitions of 'spill' suggest a rapid torrent, not gradual passive migration over the course of several years." *Id.*

The Third Circuit in *CDMG* noted that "it is especially unjustified to stretch the meanings of 'leaking' and 'spilling' to encompass the passive migration that generally occurs in landfills in view of the fact that another word used in CERCLA, 'release,' shows that Congress knew precisely how to refer to this spreading of waste." *CDMG*, 96 F.3d at 714; *see also ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 358 (2d Cir. 1997). While § 107(a)(2) only imposes liability for "disposal" of hazardous substances, other subsections of the statute trigger action where there is a "release" of such hazardous substances. 42 U.S.C. § 9606(a). CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, *leaching*, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." 42 U.S.C. § 9601(22) (emphasis added). The term "release" is thus broader than the term "disposal." The term "release" includes "disposal," but it goes beyond "disposal" by including leaching within its definition.

The courts of appeals that have considered this issue have found it particularly noteworthy that the definition of "release" includes the term "leaching," which is not included in the definition of "disposal." *CDMG*, 96 F.3d at 715; *ABB*, 120 F.3d at 358. Unlike the other terms encompassed in the definition of disposal, the term "leaching" *is* commonly used to describe passive migration. *CDMG*, 96 F.3d at 715; *ABB*, 120 F.3d at 358. The Third Circuit in *CDMG* surveyed definitions and usage of the term "leaching," and noted that:

> "Leaching" is "the process or an instance of separating the soluble components from some material by percolation." Webster's, supra at 1282. Leaching of

> contaminants from rain and groundwater movement is a principal cause of contaminant movement in landfills, see Superfund Manual, supra at 8, and is the predominant cause of groundwater contamination from landfills, Edward Repa & Charles Kufs, Leachate Plume Management 2 (1985). The word "leaching" is commonly used in the environmental context to describe this migration of contaminants. See, e.g., Steven Ferrey, The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste, 58 Geo. Wash. L.Rev. 197, 207 n. 34 (1988) ("Leachate is liquid or water soluble contaminated substances that migrate away from the point source of contamination in groundwater or surface water, often influenced by rain and normal water table activities. Such a phenomenon is described as 'leaching' of contaminants").

CDMG, 96 F.3d at 715. That Congress used the term "leaching" in the definition of "release" demonstrates that it was aware of the concept of passive migration and that it knew how to impose liability for such leaching if it desired to do so. *CDMG*, 96 F.3d at 715; *ABB*, 120 F.3d at 358. Yet Congress did not impose such liability on prior owners or operators under § 107(a)(2). Such owners or operators are liable under § 107(a)(2) only if they owned or operated the facility at the time of "disposal," not at the time of "release."

As noted, operator liability under § 107(a)(2) attaches to any person that operated the facility "at the time of disposal." 42 U.S.C. § 9607. If the passive migration of contaminants left by others that occurred here, and almost invariably occurs in such cases, were sufficient to satisfy this standard, then § 107(a)(2) "would be a rather complicated way of making liable all people who owned or operated a facility after the introduction of waste into the facility." *CDMG*, 96 F.3d at 715 (citing *Snediker Developers Ltd. Partnership v. Evans*, 773

F. Supp. 984, 989 (E.D. Mich. 1991); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989); *In re Diamond Reo Trucks, Inc.*, 115 B.R. 559, 565 (Bankr. W.D. Mich. 1990)). Likewise, such a reading of the statute would render § 107(a)(1), which imposes liability on the current "owner and operator" of a facility, unnecessary since such parties would always be liable under § 107(a)(2). As the Third Circuit noted in *CDMG*, "although CERCLA is not written with great clarity, [the courts] will not impute to Congress an intent to set up a simple liability scheme through a convoluted methodology." *Id.* at 715-16.

The structure of the statute also supports the conclusion that passive migration does not amount to "disposal" within the meaning of CERCLA. CERCLA provides a defense to liability in certain circumstances for "innocent owners." *See* 42 U.S.C. §§ 9607(b)(3), 9601(35). To qualify for the defense, a potentially liable party must establish that it acquired the site "after the disposal" of hazardous substances. 42 U.S.C. § 9601(35)(A). If "disposal" included the passive migration of contaminants left by others, this defense would virtually never be available. *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 716. "Once hazardous chemicals are in the ground, they usually spread." *ABB*, 120 F.3d at 358. If this normal migration constituted "disposal," then the innocent owner defense would be effectively eliminated since there would generally be no point "after the disposal." *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 716. The courts of appeals have thus refused to read "disposal" as including the passive migration of contaminants left by others, since Congress could not have intended to create a useless defense. *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 716.

The conclusion that the term "disposal" in § 107(a)(2) does not encompass the passive migration of contaminants left by others is supported by not only the text and structure of CERCLA, but also the underlying policy of CERCLA. One of the principal goals of Congress in enacting CERCLA was "to force polluters to pay the costs associated

with their pollution." *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 717. Indeed, the United States asserts that it seeks to vindicate this policy in bringing this case before the Court. But parties like Aerojet, who become involved with a previously contaminated site where existing waste spreads without their fault, cannot reasonably be called "polluters." *See ABB*, 120 F.3d at 358-59; *CDMG*, 96 F.3d 717. Nor is the waste at such a site "their pollution." The outcome in this case that would be proper under the statutory text, and also serve CERCLA's policy of forcing polluters to pay the costs associated with their pollution, is the one that the Cordova Parties have urged since the inception of this litigation. CPC should be liable under § 107(a)(2), not because it participated in managing its subsidiary, but because it directly operated facilities at a time those facilities were polluting the site owned by CPC's subsidiary. In contrast, Aerojet should not be liable because it did not operate facilities at a time of any polluting activities at the site.

C. Aerojet Did Not Operate Facilities at the Site at a Time of Disposal.

Aerojet agrees with the United States "that direct liability and derivative liability denote two analytically distinct concepts and hence require two separate inquiries." (U.S. Brief at 34). The court of appeals concluded that Aerojet cannot be held liable under § 107(a)(2) on a derivative liability theory, and the United States does not challenge that conclusion. The United States does, however, assert that Aerojet should be held liable under § 107(a)(2) on a direct liability theory, even though the district court ruling that it defends committed precisely the same error that it accuses the court of appeals of making: namely, failing to recognize the conceptual difference between direct and derivative theories of liability. The participation and control test proffered by the government and the district court is really a federalized veil-piercing standard, not an analytically distinct theory of liability.

In finding that Aerojet was directly liable under § 107(a)(2), the district court relied upon the exact same set of factors that it cited in evaluating Aerojet's derivative liability through piercing of the corporate veil under § 107(a)(1). The eleven factors cited by the district court all relate to the relationship between Aerojet and its subsidiary corporations. (Pet. App. 121a-122a, 124a) While the relationship between the parent and subsidiary corporations is the appropriate focus when determining whether the parent may be subject to derivative liability, this relationship is not the proper focus when a direct liability theory is advanced. Direct liability, as the United States repeatedly urges, must be based upon the parent corporation's own acts. Yet none of the factors cited by the district court suggests any actions by Aerojet that resulted in a disposal of hazardous substances at the facility. Aerojet's only "direct involvement with the site," according to the district court's opinion, was limited to such benign activities as supervising construction, participating in discussions regarding a possible sale of the site (including preparation of a prospectus), and leasing portions of the site to third parties after production at the site had ceased. (Pet. App. 94a.)

The United States notes the district court's finding that Aerojet was active in all aspects of its subsidiary's business at the site, including waste disposal. (U.S. Brief at 47). The United States, however, fails to put this finding in context. To the extent that Aerojet can be said to have been involved in the waste disposal practices of its subsidiary, these were *proper* waste disposal practices. The district court specifically found that: "During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it into the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras . . . . Cordova/Michigan discharged chemical waste through off-site disposal." (Pet. App. 62a) Any actions by Aerojet, then, with regard to waste disposal at the site did not relate to the disposal of hazardous substances at the facility, but rather related to proper off-site waste disposal practices. Accordingly, since Aerojet's own actions never

resulted in any disposal of hazardous substances whatsoever at the facility, it cannot be held liable under § 107(a)(2) on a direct liability theory.

IV. CPC IS DIRECTLY LIABLE UNDER CERCLA, APART FROM ITS OVERALL RELATIONSHIP WITH ITS SUBSIDIARY, BECAUSE CPC ENGAGED IN BOTH POLICY-MAKING AND DAY-TO-DAY OPERATIONS THAT CONTRIBUTED TO POLLUTION AT THE SITE.

Unlike Aerojet, CPC's own actions with regard to this facility subject it to direct liability under § 107(a)(2). The district court found that CPC actively participated in, and exerted significant control over, its subsidiary's affairs at a time when the disposal of hazardous substances was occurring at the facility.[12] (Pet. App. 110a-111a.) In particular, this participation extended to "specific policy matters including hazardous waste disposal" at the site. (Pet. App. 110a.) The district court's findings of fact provide ample support for the conclusion that CPC's own actions make it responsible as a party that operated a facility at a time of disposal of hazardous substances.

The district court found that CPC was directly involved in the environmental and regulatory affairs of its subsidiary through the work of Rick Williams, CPC's governmental and environmental affairs director. (Pet. App. 74a-75a.) Williams "actively participated in and exerted control over a variety of Ott II environmental matters." (Pet. App. 75a.) His involvement included his participation in an Ott II

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[12] CPC conceded at the court of appeals that direct liability may be imposed if the parent conducts day-to-day operations at the facility. (Supplemental Brief of CPC in the Sixth Circuit, October 30, 1995, at 14n. 5) CPC claims its conduct does not satisfy this test, but the district court made extensive findings of fact to the contrary. (Pet. App. 111a.) CPC should thus be held liable under the direct liability standard that it concedes is applicable.

meeting with officials from the state Water Resources Commission, at which he used his influence to block presentation by Ott II of its plans for a biological waste treatment facility that he considered unnecessary. (*Id.*) Williams also "instructed Ott II officials to limit cooperation with state and federal regulators regarding waste disposal and to consult with CPC before responding to regulatory questionnaires or other inquiries." (*Id.*)

This latter directive allowed CPC's Williams to carry out his policy that "delaying tactics are almost always advisable" with regard to the pollution going on at the facility. (*Id.*) In a memo to Ott II officials, Williams directed that "any unannounced visit by regulators 'should be stalled for advice from N.Y.'" and that any questionnaires "should be filled in promptly in pencil" and forwarded to CPC for "review and decision on reply." (Pet. App. 75a-76a.) Other CPC officials were also directly involved with the ongoing pollution occurring at the facility. The district court noted that Hanes Heller, a CPC attorney, negotiated with the state regarding Ott II's use of a county wastewater treatment system, provided detailed instructions to Ott II setting forth the objectives of these negotiations, and indicated that CPC's approval of any agreement was required. (Pet. App. 76a.)

The district court's findings make clear that there is a substantive difference between Aerojet's involvement with the site and that of CPC. Aerojet had no involvement, direct or indirect, with the site at any time during which the disposal of hazardous substances occurred. Aerojet's only involvement with the site was as the parent corporation of a subsidiary conducting business at the site after all of the disposal of hazardous substances had already occurred. CPC, in contrast, was directly involved in operating the site at a time of continuing disposal of hazardous substances at the site. Thus, CPC, unlike Aerojet, can be held liable under § 107(a)(2) on a direct liability theory since through its own actions it operated a facility at a time when the disposal of hazardous substances occurred.

V. EVEN IF THE CORDOVA PARTIES WERE OTHERWISE LIABLE, CERCLA'S THIRD PARTY DEFENSE MANDATES DISMISSAL OF THE CLAIMS AGAINST THE CORDOVA PARTIES.

Even if Aerojet or its subsidiaries were otherwise liable, the applicability of the third-party defense provided by § 107(b)(3) would merit dismissal of the claims against them. The Cordova Parties qualify for the third-party defense available under § 107(b)(3) of CERCLA. Section 107(b)(3) provides that:

> (b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b). Cordova/Michigan, Cordova/California, and Aerojet meet each of the requirements of this defense: (1) contamination caused solely by third parties; (2) absence of a

disqualifying contractual relationship with persons who caused contamination; and (3) exercise of reasonable conduct at the site. They are in a position similar to that of the current owner in *New York v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996), in which the Second Circuit affirmed summary judgment on the third-party defense dismissing CERCLA claims against the current owner based on contamination caused by predecessors at the site. The same result should apply in favor of the Cordova Parties.

A. Prior Owners and Operators Caused All the Contamination at the Site.

All contamination at the site was caused solely by the companies that owned and operated the site before the bankruptcy trustee succeeded by operation of law to ownership of the site in 1977.[13] Evidence of releases from unlined seepage lagoons, chemical spills, leaking drums and various other sources during operation of the facility by those prior owners is overwhelming. (Pet. App. 60a-61a.) As early as 1967, in a capital expenditure request to CPC's Board of Directors, CPC itself conceded that its Ott subsidiary was polluting the site. (Tx 418, Minutes of June, 1967, Board Meeting, p. 6 and attachment.)

In stark contrast, there is no evidence that Cordova/Michigan, Cordova/California or Aerojet caused any pollution at the site. Cordova/California and Cordova/Michigan ran environmentally sound operations. This fact is supported not only by the testimony of former and current employees of Cordova/California and Cordova/Michigan, but also by the testimony of officials for both government agencies that have made CERCLA claims against the Cordova Parties in this case. (Truchan Dep at 76; Hart Dep at 90-91, 95-102, 110-113.) The Cordova Parties simply did not cause contamination at the site.

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[13] No one has alleged that the bankruptcy trustee caused or contributed to the release or threatened release of hazardous substances at the site.

The district court's suggestion that the Cordova Parties cannot qualify for the third-party defense because of natural migration of contaminants left by CPC's former operating unit (Pet. App. 127a-128a) was explicitly rejected in *United States v. Mirabile*, 10 Chem. & Rad. Waste Lit. Rep. 661 (E.D. Pa. Sept. 4, 1985). The Mirabiles had obtained title to property at a sheriff's sale following a foreclosure. The previous owner of the property had abandoned several hundred leaking drums of hazardous waste scattered about the site. After receiving title, the Mirabiles initially did nothing about these drums but eventually moved the leaking drums to a warehouse where the drums "remained in a deteriorated and leaking condition." *Id.* at 665. The United States later removed the drums from this warehouse and sought to recover the costs of that action from the Mirabiles. The Mirabiles asserted the third-party defense. The United States moved for summary judgment rejecting the defense and argued that the Mirabiles could not claim the third-party defense because the drums continued to leak while the Mirabiles owned the property. The Court disagreed and held that "a common-sense reading of the language of the statute suggests that the defense would be potentially available to a party who can establish that he purchased property on which hazardous wastes were placed by others and that he did not add to those wastes." *Id.* The Court stated that this interpretation was supported by "the presence of principles of causation in the language of the defense . . . which are noticeably absent from the remainder of § 107." *Id.* This case is even stronger than *Mirabile* because no additional pollution entered the environment following Cordova/California's acquisition in 1977. All the contamination was already in the soil and groundwater when Cordova/California purchased the site.

Nothing in the text or logic of CERCLA suggests that natural migration of contaminants deposited by others disqualifies a person from relying on the third-party defense. Under such an interpretation, the third-party defense would be available only to those who prevented all migration of contamination during their ownership. To prevent all migration of hazardous substances already introduced into the

environment would generally require complete extraction of all contaminants from the soils and groundwater: in other words, a complete cleanup. Moreover, the complete cleanup would have to occur before the purchaser accepted title to the property. Otherwise, any migration that occurred during the remediation would preclude the purchaser's reliance on the third-party defense. If this is what Congress intended, it would have said so plainly, or simply eliminated the defense. *See Lashins Arcade*, 91 F.3d at 361 (rejecting construction of third-party defense that would require party to conduct portion of clean up to qualify for defenses).

Moreover, in this case the contaminated groundwater plume at the site had already stabilized by 1976, before any of the Cordova Parties had any contract with the site, as the trial court had determined in prior litigation involving CPC's responsibility for the contamination emanating from the site. (Tx 1573, Findings of Fact from *Gollach v. CPC Int'l, Inc.*, W.D. Mich. August 17, 1981, at ¶ 28.) The shape of the plume has not significantly changed since that time. (Tx 1989 at 2, February 7, 1983, Correspondence from CPC's counsel to U.S. EPA ("The plume is laterally stable.").) Thus, any natural migration that occurred in this case is limited to movement of water molecules through an already-defined and stationary plume. If this is enough to defeat the defense, then no one can ever qualify.

B. The Cordova Parties Did Not Have a Disqualifying Contractual Relationship With Any of the Persons Who Caused the Contamination.

None of the acts or omissions that caused contamination at the site "occur[red] in connection with a contractual relationship" between any of the persons who caused the contamination and any of the Cordova Parties. No party claims that the Cordova Parties had direct contractual relationships with CPC, Ott, Story or any other prior owner or operator that caused contamination at the site. Instead, CPC has suggested that the Cordova Parties are disqualified from relying on this

defense because of the purchase agreement between Cordova/California and the bankruptcy trustee representing Story's creditors, and because of the Stipulation and Consent Order with MDNR. (August 4, 1993 CPC Brief at 34.) CPC is mistaken. The releases of hazardous substances at the site were not "caused" by "acts or omissions" of the bankruptcy trustee and did not "occur in connection with" the Stipulation and Consent Order.

A party is not disqualified from the third-party defense merely by having a contractual relationship with a potentially liable party under CERCLA, but rather by having a contractual relationship with a party that "caused" a "release of hazardous substances." Moreover, the release itself must have "occur[red] in connection with" the disqualifying contractual relationship for the protections of the third-party defenses to be lost. *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 964 F.2d 85, 89 (2d Cir. 1992) ("a landowner is precluded from raising the third-party defense only if the contract [with a party that caused the releases] somehow is connected with the handling of hazardous substances."); *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1543 (E.D. Cal. 1992); *United States v. A&N Cleaners and Launderers, Inc.*, 842 F. Supp. 1543 (S.D.N.Y. 1994). Even the cases on which CPC has relied illustrate the point. In *In re Sterling Steel Treating, Inc.*, 94 B.R. 924 (Bankr. E.D. Mich. 1989), the court found only that the bankruptcy *estate* was a potentially responsible party under § 107(a)(1) as the site's current owner and operator. The court made no finding at all regarding the potential liability of the bankruptcy *trustee*, much less that the bankruptcy trustee somehow caused a release of hazardous substances and thus disqualified a subsequent purchaser from relying on the third-party defense.[14] Likewise, in *City of Phoenix, Ariz. v. Garbage Services Co.*, 816 F.

[14]Contrary to CPC's statement below, *Sterling Steel* did *not* reject a purchaser's assertion of the third-party defense based on a contractual relationship with the trustee. The bankruptcy court does not even discuss the issue in rejecting the defense on other grounds. *Sterling Steel*, 94 B.R. at 928-30.

Supp.. 564, 568 (D. Ariz. 1993) the court found only that a trustee holding title was liable under CERCLA § 107(a)(1) as the site's current owner. Once again, the court did not even address the cause of contamination. No party has alleged that the bankruptcy trustee in this case actually caused contamination at the site. Accordingly, the purchase agreement is not a contractual relationship in connection with any conduct that caused the site's contamination.

Likewise, the Stipulation and Consent Order with MDNR does not disqualify the Cordova Parties from the third-party defense. *United States v. Hooker Chemical & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988), cited by the MDNR below, actually supports the Cordova Parties' position that no disqualifying contractual relationship existed. In *Hooker Chemical*, Occidental Chemical Company deposited 42 million pounds of chemicals that eventually contaminated Love Canal. Occidental asserted the third-party defense, claiming that the chemicals were secure when it sold the site. The court rejected the defense because Occidental had a continuing contractual relationship with those who actually caused the contamination and had retained the ability to control their actions. *Id.* at 558. In contrast, none of the Cordova Parties had the ability to control the action of any of the parties that caused the contamination at the site. Moreover, any releases of hazardous substances attributable to MDNR's inaction did not "occur in connection with" the Stipulation and Consent Order. *See* 42 U.S.C. § 9607(b)(3). It would be incongruous indeed if a release from liability given by a state stripped the recipient of statutory protection that would otherwise protect it from liability for pollution caused by others.

C. The Cordova Parties Acted Reasonably by Conducting Environmentally Sound Operations and by Relying on the Promises Made by MDNR in the Stipulation and Consent Order.

The Cordova Parties acted reasonably in responding to contamination at the site. Before agreeing to purchase the property,

Cordova/California reached an agreement with the State of Michigan and MDNR that addressed all the environmental problems at the site and assigned responsibility for abatement and remedial actions. (Tx 1019, Consent Order; Swanson Dep at 57-59.) Cordova/California satisfied its obligations under the agreement by removing phosgene which had been left on site and by providing the agreed-upon funds to the State of Michigan. (Tx 1053, January 4, 1978, correspondence from MDNR; Tx 1064, February 16, 1978, correspondence to Hogarth; Tx 1130, correspondence to MDNR and canceled checks). Cordova/ California also removed contaminated sludge left in the equalization basin by the previous owners. (Pet. App. 62a.) Cordova/Michigan disposed of abandoned drums that the State failed to remove. It also demolished and disposed of contaminated buildings and equipment left by the previous owners before commencing any operations at the site. (R:187 at Exhibit Q, Response to CPC's Interrogatories at 41; Tx 1364, Peden Affidavit, ¶ 5.) All of these actions were taken with due care and in the interest of improving the environmental condition of the site.

Similarly, the Cordova Parties' reliance on MDNR to address groundwater contamination at the site was, and is, reasonable and consistent with the exercise of due care. It would be incongruous, to say the least, if the Cordova Parties' reliance on the department of state government charged with responsibility for protecting Michigan's natural resources were found to be so unreasonable as a matter of law to preclude application of the third-party defense. Like other proffered interpretations of the statute, this attempt to defeat the third-party defense ultimately comes down to the proposition that the defense protects only those who voluntarily assume the liability from which the defense supposedly protects them. For reasons already recited, that is not and cannot be the law.

CPC has also suggested in earlier briefing that the Cordova Parties' failure to operate the Ott "purge system" was unreasonable and that the migration of hazardous substances was unchecked during the Cordova era. The accusations are unfounded. The so-called Ott "purge

system" was nothing but a mirage. After a thorough consideration of the evidence, the district court concluded that the Ott purge system had simply not been effective to stop the spread of contaminants. (R:532, July 22, 1992, Opinion Denying Motion to Amend and Denying Motion to Reopen the Record at 7) ("the wells were operated intermittently and . . . they were not sufficiently effective to check the underground spread of contamination.").) Moreover, the purge system no longer existed by the time any of the Cordova Parties had contact with the site. (R:390, Peterson, Tr at 486 (the purge system had already been largely dismantled).) The record does not support this "unchecked migration" theory. By the time the Cordova Parties first came to the site, the plume of contaminants had already migrated off site as far as it ever would go. (Tx 1573, Findings of Fact from *Gollach* litigation; Tx 1989, February 7, 1983, letter to U.S. EPA at 2; Truchan Dep. at 239-40.) In fact, CPC itself has repeatedly argued to federal regulators that purging at the site is unnecessary and that the contamination problems at the site have not worsened due to any migration. (R:333, UF at ¶ 235; Tx 1858, July 22, 1981, letter to MDNR; Tx 1860, July 29, 1981, letter to Tanner; Tx 1864, October 13, 1981, letter to U.S. EPA; Tx 1989, February 7, 1983, letter to U.S. EPA; Tx 2402, November 7, 1986, letter to U.S. EPA.) The Cordova Parties' "failure" to reconstruct and use a "system" that never worked in the first place is not unreasonable.

The Cordova Parties have taken precautions against foreseeable acts or omissions by third parties. The language of this final element of the § 107(b)(3) defense indicates that it applies exclusively to prospective conduct of third parties: conduct that has already occurred cannot be "foreseeable". Accordingly, the requirement has no real application to a case like this one, in which all existing contamination occurred before Cordova/California acquired the site. *Cf. United States v. Sharon Steel,* 1988 U.S. Dist. LEXIS 11975 (D. Utah July 13, 1988) (omitting any discussion of the requirement in a case involving contamination already caused by previous owners or operators); *State of Washington v. Time Oil Co.*, 687 F. Supp. 529, 533 (W.D. Wash. 1988)

(merging the requirement into the "due care" requirement). Furthermore, Cordova/California took "precautions" with regard to the existing contamination by entering into a Consent Order with MDNR to allocate responsibility for the abatement and remediation of the contamination problems and by removing all actual and potential sources of contamination to which such an outside party might obtain access, such as phosgene and barrels of chemicals.

There should be no question but that Cordova/California and Cordova/Michigan acted reasonably with respect to the environmental contamination at the site and that the Cordova Parties are entitled to the benefit of the § 107(b)(3) defense. If there is any question remaining, then the issue should be remanded for consideration by the lower courts.

CONCLUSION

The court of appeals correctly drew a sharp analytical distinction between derivative liability under the applicable corporate law of veil piercing and direct statutory liability under § 107(a)(2). The district court's and the government's proffered "participation and control" theory ignores the statutory text and necessarily leads to improper development of a federal common law of veil piercing in CERCLA cases. Accordingly, this Court should reject the "participation and control" test and confine direct CERCLA liability under § 107(a)(2) to the words of the statute itself. Under § 107(a)(2), none of the Cordova Parties can be liable because none operated facilities at a time of new disposal. CPC, however, can and should be directly liable under § 107(a)(2) for its own conduct at the Site based on the facts found by the district court.

Even if this Court adopts the "participation and control" test proffered by the government, it should not reverse the court of appeals' judgment as to the Cordova Parties. It should either affirm the judgment on the alternate grounds of the third party defense and the

proper definition of "disposal" under CERCLA, or in the alternative, remand for plenary consideration of these issues in the lower courts.

Respectfully submitted,

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February 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 97-454

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), *ET AL.*, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OPPOSITION OF RESPONDENT BESTFOODS TO MOTION FOR DIVIDED ARGUMENT

Respondent Aerojet-General Corporation and its subsidiaries ("Aerojet") have moved under Rule 28.4 to divide the argument time available to the respondents in this case. If the Court were to grant this motion, it would make a mockery of the adversary process. As we explain below, Aerojet has admitted that it is not adverse to the United States on the sole question on which certiorari was granted. Indeed, Aerojet strenuously *supported* the government's position on that question in the court of appeals. Moreover, Aerojet also has admitted that it has no stake in the outcome of the question presented. In these unique circumstances, the Court should act to ensure that the oral argument consists of a legitimate adversary presentation of the issues — not just by denying Aerojet's frivolous motion, but by directing that the argument for respondents be presented by counsel for Bestfoods ("CPC").

1. At the petition stage, Aerojet conceded that it does not have "a significant enough financial interest in the question" before this Court "to present the adversity necessary for proper

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presentation of the issue in this Court." Aerojet Br. in Opp. 4 n.1. Aerojet explained that, under an agreement upheld by the Michigan courts, the State of Michigan would be responsible for any CERCLA liability that may be apportioned to Aerojet (*id.* at 4), and it acknowledged that this lack of financial risk meant that Aerojet's posture in this case deprived it of the "adversarial nature * * * necessary for careful adjudication of the issues." *Id.* at 12. See also No. 97-296 U.S. Br. 7. Aerojet's interest is *exactly* aligned with Michigan's; that is why Michigan did not even name Aerojet as a respondent in its separate petition from the same judgment, No. 97-296.

In addition, Aerojet apparently is at the brink of (if it has not already reached) a settlement agreement that, if approved, would excuse Michigan from liability by excusing Aerojet from the obligations it would accrue as a *present* owner and operator of the Muskegon site as well as a past owner and operator. The United States disclosed the advanced stage of those negotiations some months ago and suggested that those negotiations would continue while this case was pending (see No. 97-296 U.S. Br. 9-10 n.4). If Aerojet indeed has reached settlement terms with the United States and Michigan, it plainly has no standing to present its views supporting those parties as a sham respondent here.

2. Moreover, in the courts below *Aerojet agreed with the United States on the single legal question presented in this case*, and argued against the standard urged by CPC and adopted by the Sixth Circuit. See U.S. Br. 48 (citing Aerojet C.A. Br. as Appellee 32). Thus, Aerojet contended in the court of appeals that CERCLA liability could be imposed on a parent corporation that "actively participated in and exerted control over the operation of its wholly-owned subsidiary." Aerojet C.A. Br. as Appellee 28. See also, *e.g.*, *id.* at 36 (arguing that CPC should be liable as "[a] parent corporation * * * that participates actively in its subsidiary's operations while the subsidiary

is causing pollution"). Aerojet also argued that state-law veil-piercing analysis had no place whatsoever in determining whether a parent corporation "operated" a facility operated by its subsidiary (*id.* at 34-35) and explicitly rejected any "distinction between operation of a subsidiary corporation and operation of" a facility as defined in 42 U.S.C. § 9601(9). *Id.* at 32 n.19.

3. Aerojet now professes to have changed its views on the question presented. Motion, p. 1. But its three pages of perfunctory legal argument on the issue (Aerojet Br. 24-27), which lack even a single citation to authority other than general statements in the legislative history, belie that contention and fulfil Aerojet's prediction (Br. in Opp. 4 n.1, 12) that its lack of adversity would prevent it from making a "proper presentation" on the only legal question that this Court has accepted for review.

One thing is unchanged about Aerojet's position, however: it remains aligned with the United States with respect to *CPC's liability* under CERCLA for the operations of its subsidiary. Aerojet's distorted statement of facts (Aerojet Br. 6-15), as well as much of its legal argument (*id.* at 36-37), are devoted to showing why the judgment should be *reversed* as to CPC. CPC, by contrast, urges a complete affirmance of the judgment below as to all parties. It would be a disservice to the Court, and a gross injustice to CPC, to take part of the oral argument time allocated to the *respondents* and give it to a party that agrees with the *petitioner*.

4. Aerojet uses most of its brief to this Court (see Aerojet Br. 27-36, 38-46), and proposes to spend some or all of its argument time (see Motion, pp. 1-2), addressing issues — whether disposal occurred while the Aerojet subsidiaries operated the site, and the availability of certain defenses — that the court of appeals did not definitively resolve. Specifically, because the Sixth Circuit questioned whether the record supported the findings adverse to Aerojet on those points, it

remanded for the trial court to "indicate with greater specificity precisely which portions of the record it relies upon [for] support." Pet. App. 22a (disposal). See *id.* at 22a-24a (defenses). Those plainly interlocutory issues were not raised in the petition for a writ of certiorari and were not briefed by the United States. Contrary to Aerojet's apparent belief (see Motion, pp. 1-2), were this Court to reverse the judgment with respect to the question that *was* presented, the Sixth Circuit's resolution of the extraneous issues would not dissolve "into a judgment against Aerojet." Rather, the remand order would remain in place.

In sum, Aerojet has no stake in the issue that the Court will decide and proposes to use its argument time as respondent (1) to seek reversal of a portion of the judgment below and (2) to debate irrelevant questions that are not before the Court. If Aerojet requires argument time, that time should come from the government, whose position with respect to the judgment against CPC Aerojet supports. Aerojet should not be permitted to make a travesty of the oral argument in this case by undermining the full and fair presentation of the issues before this Court by the one party that *is* adverse to the petitioner and that *did* seriously brief the question presented.

It is therefore respectfully submitted that the motion for divided argument should be denied.

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Dated: March 5, 1998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-454

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), *ET AL.*, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY OF RESPONDENTS AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY, AND CORDOVA CHEMICAL COMPANY OF MICHIGAN IN SUPPORT OF MOTION FOR DIVIDED ARGUMENT

Respondents Aerojet-General Corporation, Cordova Chemical Company of Michigan and Cordova Chemical Company (the "Cordova Respondents") reply to respondent Bestfoods' ("CPC") opposition to motion for divided argument and, in particular, to CPC's suggestion that the Court assign argument responsibility to CPC's counsel. The Cordova Respondents respectfully submit that CPC is in no better position than the Cordova Respondents to argue the merits of the government's proposed test of parent corporation liability under CERCLA §107(a)(2), and that only the Cordova parties are in a position to address all of the issues necessarily raised by the government's request for a reversal of the judgment in favor of Cordova.

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1. Like Respondent CPC, the Cordova Respondents reject the participation and control standard advanced by the United States as a violation of both the policy and text of the statute. (*See* brief of the Cordova Respondents at 1-2, 21-27.) CPC's claim that the Cordova Respondents are aligned with the federal government on this issue is blatantly wrong.[1]

2. CPC's suggestion that it would be "a gross injustice" to allow the Cordova Respondents to argue because the Cordova Respondents continue to assert a basis for liability against CPC misses the point. The Cordova Respondents and CPC have been adverse to each other since CPC started this litigation by suing the Cordova Respondents under CERCLA. CPC has never formally abandoned its claim throughout this litigation that the Cordova Respondents should be liable. To the contrary, CPC asserted this position in the Court of Appeals, *see* CPC C.A. Brief (August 4, 1993) (asserting CERCLA liability against the Cordova Respondents) and filed a Conditional Cross-Petition against the Cordova Respondents in this Court. Accordingly, respondent CPC and the Cordova Respondents are in exactly the same position: both agree that the government's proposed test of liability is incorrect, but both nevertheless maintain a basis for liability against each other on other grounds.

[1] CPC's citation to selected portions of the briefing in the Court of Appeals is beside the point. When the parties briefed this case to a panel of the Court of Appeals, the controlling standard of parent corporation liability in the Sixth Circuit was the "ability to control" standard articulated in *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993). (*See* Aerojet C.A. brief at 31.) Aerojet briefed the case under the controlling authority, and further argued that the same results should obtain under the standard adopted in other circuits at the time of the panel briefing. *Id.* at 32-34. The Cordova Respondents took no position on the issue before the *en banc* Court of Appeals. (*See* Supplemental Aerojet C.A. Brief.) Now that this Court has granted certiorari, the Cordova Respondents have the opportunity to address the question in the absence of controlling legal authority and, like CPC, urge rejection of the government's proposed standard.

3. The Cordova Respondents welcome CPC's suggestion that reversal of the judgment in favor of Aerojet would not preclude Aerojet from arguing below that it should still win on other grounds, but this is not the relief the United States has requested. If this were the result sought by the United States, it would have requested vacatur of the Sixth Circuit decision in favor of Aerojet and remand for resolution of the remaining liability issues. *Cf.* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (6th ed.) at 248, 250 (distinguishing reversal from vacatur in the context of summary disposition). Instead, the government has requested reversal of "the Court of Appeals' judgment with respect to Aerojet's liability as an operator under Section 107(a)(2)." (United States Brief at 48). As described in the Cordova Respondents' brief on the merits, this Court cannot grant the government this relief without resolving critical statutory issues no respondent other than the Cordova Respondents has addressed.[2]

4. The Cordova Respondents have not, as CPC argues, disqualified themselves from presenting oral argument by originally asking this Court to deny certiorari on the claims against Aerojet for a variety of reasons, including those now highlighted by CPC.[3] Obviously, this Court did not find the reasons presented by the Cordova Respondents persuasive, and so the

[2] Moreover, it is entirely proper for the Cordova Respondents to urge before this Court any reason supported by the record in support of the outcome reached by the Court of Appeals. *See e.g., United States v. Arthur Young and Co.*, 465 U.S. 805, 814 n.12, 104 S.Ct. 1495, 1501 n.12 (1984); *Smith v. Phillips*, 455 U.S. 209, 215 n.6, 102 S.Ct. 940, 945 n.6 (1982); *Hutchinson v. Proxmire*, 443 U.S. 111, 122 n.10, 99 S.Ct. 2675, 2981 n.10 (1979); *United States v. New York Tel. Co.*, 434 U.S. 159, 166, n.8, 98 S.Ct. 364, 369 n.8 (1977); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419, 97 S.Ct. 2766, 2775 (1977).

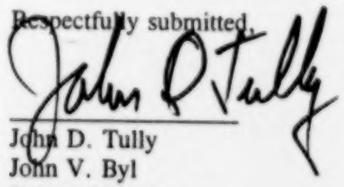
[3] The Cordova Respondents have not reached a settlement with the government.

Cordova Respondents find themselves before this Court. If this Court is now inclined to dismiss the writ as to the claims against the Cordova Respondents, the Cordova Respondents would welcome the Order. Unless and until such an order issues, however, the Cordova Respondents intend to defend themselves vigorously.

Accordingly, the Cordova Respondents again ask the Court to grant the relief requested in their Motion for Divided Argument and, further, to reject the invitation of CPC to intervene in the decision of the respondents as to selection of arguing counsel.

March 6, 1998

Respectfully submitted,



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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL, INC.), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE UNITED STATES

The United States submits that the private respondents "operated" the Muskegon site, within the meaning of Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a)(2), because they each actively participated in, and exercised control over, the running of that facility. The government's submission rests on the ordinary meaning of the term "operated" and other textual indicia of congressional intent. Respondent Bestfoods (formerly CPC International, Inc. and designated CPC here) answers by embarking on a legal odyssey that takes the Court to many remote areas, but avoids calling on the ordinary meaning of the controlling statutory term. Respondent Aerojet-General Corporation argues that only

CPC is liable at the site, and goes on to address questions that are not before this Court. Because respondents have obscured the key issue, we begin by briefly restating the government's position and then turn to respondents' specific contentions.

I. A Parent Corporation That Actively Participated In, And Exercised Control Over, The Operations Of A Subsidiary May Be Held Liable Under CERCLA As An Operator Of the Subsidiary's Facility

The question before the Court is purely one of statutory construction. Section 107(a)(2) of CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. 9607(a)(2). Section 101 of CERCLA defines the term "person" to include a corporation (42 U.S.C. 9601(21)), and the term "facility" to include "any site or area" where a hazardous substance has come to be located (42 U.S.C. 9601(9)). CERCLA accordingly imposes liability on respondent corporations CPC and Aerojet if they "operated" the Muskegon site.

CERCLA does not define the term "operated," and the term therefore retains its "ordinary and natural meaning." *E.g.*, *Bailey* v. *United States*, 516 U.S. 137, 145 (1995). See U.S. Br. 20. Under ordinary English usage, to "operate" a facility includes to "direct the working of" or "manage" the facility. See *id.* at 20-21 (citing three authoritative English dictionaries). The United States has accordingly construed Section 107(a)(2) to impose direct liability on a "person," whether a corporation or an individual, if the person actively participated in, and exercised control over, the running of a facility. The United States' construction is not only firmly founded on the plain language of Section 107(a)(2); it is also consistent with every other indicium of congressional intent, see *id.*

at 21-28, and reflects the longstanding majority view of the courts of appeals, see *id.* at 28-31.

In accordance with that construction, the United States has sought to hold parent corporations liable for operating a subsidiary's facility in those situations in which the facts demonstrate that the parent corporation exercised actual control over the running of the facility. In this case, the United States proved at trial that the parent corporations, CPC and Aerojet, exercised such extensive control over the management and decisionmaking of their subsidiaries' facility that the parents had, in fact, operated the facility. The district court specifically so found. *E.g.*, Pet. App. 124a ("As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decisionmaking at Cordova/California and Cordova/Michigan *shows that the parent operated the facility*." (emphasis added)). Under the United States' construction, CPC and Aerojet are liable precisely *because* the factual record shows that they directly participated in the operational decisions that caused the hazardous conditions at the Muskegon site. The State of Michigan and other States agree with that construction. See Mich. Br. 6-14; Minn. *et al.* Amici Br. 6-17.

II. CPC Misconstrues Section 107(a)(2)

A. CPC states at the outset that "the starting place" is "'the language of the statute'" (CPC Br. 15), but its argument quickly departs for destinations far removed from the statutory text. At each juncture, CPC directs the Court away from CERCLA's clear language and ultimately leads the Court into the thicket of state doctrines respecting "piercing the corporate veil."

1. (a). CPC concedes that the term "operated" must be given its "ordinary or natural" meaning (CPC Br. 15), but it assiduously avoids reliance on the precisely relevant dictionary definition of the verb "operate" (*id.* at 16-21). Rather, CPC tells the Court that the term "operator" is limited to "the person that directly runs a machine, a

business, or (as here) a disposal 'facility.'" CPC Br. 16. According to CPC, "[t]he only 'operating' that matters, therefore, is the actual physical 'operating' of the 'facility' where hazardous substances were placed." *Id.* at 18. CPC derives that definition by taking the Court on a field trip through unrelated federal and state statutes that use the term "operator" in different contexts. See *id.* at 16-18 (citing, for example, state motor vehicle statutes, agricultural credit laws, and an 1881 mining glossary). In CPC's view, the noun "operator" and the qualified noun "immediate operator" are actually synonymous, and it uses those terms interchangeably throughout its brief.[1]

CPC's novel usage is flawed for three fundamental reasons. First, Congress did not use the term "immediate operator." Indeed, the relevant statutory term is not the noun "operator" but rather the verb "operate." CERCLA defines an "operator" of a facility as "any person * * * operating such facility," 42 U.S.C. 9601(20)(A), and Section 107(a)(2) specifically uses the verb "operated," 42 U.S.C. 9607(a)(2). Hence, the fact that Congress or a state legislature may have given the noun "operator" a specialized meaning in a particular statutory context is irrelevant to Congress's use of the term "operator" in CERCLA. Instead, the ordinary meaning of the verb "operate" should control.

Second, authoritative English language dictionaries provide a specific definition of "operate" in the precise context—the operation of an industrial "site"—that embraces the situation here. Those definitions expressly state that the verb "operate" in that context includes managerial control. See, *e.g.*, *The Oxford English Dictionary* (2d ed. 1989) (defining "to operate" as "[t]o direct the working of; to manage"). Those dictionaries *do not*

[1] See CPC Br. 1 ("the immediate operator"); *id.* at 13 (nothing "suggests an intent to extend liability beyond those persons immediately 'operating'"); *id.* at 15 ("corporation that immediately operates a facility"); *id.* at 17 ("immediate" operator).

state that one must "directly run[]" or "physical[ly] operat[e]" the facility or site. See, *e.g.*, *Webster's Third New International Dictionary* (1967) (defining "to operate" as "to manage and put or keep in operation *whether with personal effort or not*" (emphasis added)).[2]

Third, CPC's construction would produce the absurd result that CPC would be entitled to control decision-making at the facility but others alone would be subject to liability for its decisions. Indeed, if CERCLA's use of the term "operator" were limited to the "immediate, on-site person[s]" who "directly run[]" and engage in the "actual physical 'operating'" of the facility (CPC Br. 16, 17, 18), then the United States would be limited to seeking cost recovery from the chemical plant's work force. Under CPC's usage, those individual workers—such as seamen (*id.* at 16), miners (*id.* at 17), family farmers (*id.* at 17 n.7), gas station attendants (*id.* at 17 n.8), dump truck drivers (*id.* at 18 n.9), and others who "engage[] * * * in the mechanical aspect of any process or activity" (*id.* at 18 n.11)—would be the "immediate, on-site person[s]" who "directly run[]" and "physical[ly] 'operat[e]'" a chemical plant (*id.* at 16, 17, 18).

CPC's position produces incongruous results because CPC refuses to acknowledge that Section 107 im-

[2] CPC reaches back to cases such as *Pullman's Palace Car Co.* v. *Missouri Pacific Ry.*, 115 U.S. 587 (1885), to demonstrate that a parent corporation does not necessarily "operate" a subsidiary's facility. CPC Br. 19. We have not contended, of course, that a parent *always* does so. See, *e.g.*, U.S. Br. 41, 44. By the same token, *Pullman's* does not stand for the proposition that a parent can *never* "operate" a subsidiary's facility. See *Chicago, M. & St. P. Ry.* v. *Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 500-501 (1918) (distinguishing *Pullman's*). Even the court of appeals rejected that proposition, see Pet. App. 12a, and CPC ultimately concedes that point as well, CPC Br. 33 n.20. The question here is *when* does a parent "operate" a subsidiary's facility. Congress indicated, by Section 107(a)(2)'s use of the unadorned term "operated" and other textual indications, U.S. Br. 22-25, that a parent does so when it actively participates in the management of the facility.

poses liability based on actual responsibility, not physical proximity. See U.S. Br. 26, 41. Section 107(a)(2) allows the United States to recover its cleanup costs from those entities that exercised managerial control over the running of the facility and the day-to-day decisionmaking that created the hazardous situation. CPC's liability as an operator should be determined on the basis of whether CPC participated in those managerial and decisionmaking activities. The district court specifically found that CPC exercised that type of "operational" responsibility at the Muskegon site. See Pet. App. 111a ("The evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator.").[3]

(b). CPC also errs in arguing (CPC Br. 19, 20, 45) that the government's construction of Section 107(a)(2) is flawed because the government seeks to hold CPC liable for "operating" the Ott II subsidiary and not for operating the subsidiary's facility. CPC confuses the *Section 107(a)(2) liability standard* with the government's *method of proof* in this particular case. The United States has consistently asserted that Section 107(a)(2) subjects CPC to liability because it actually exercised extensive managerial control over the Ott II *facility*. See U.S. Br. 17, 20-26, 34, 44. The United States proved at trial that CPC was liable under that standard by, among other

[3] CPC suggests in a footnote that CERCLA reflects a "statutory assumption that, in the run of cases, there would be only one 'owner' and one 'operator' of a 'facility' at any given time." CPC Br. 18 n.10. CPC is mistaken. As a matter of common experience, Congress was surely aware that a facility, like any commercial property, can be owned by more than one "person" or operated by more than one "person." As a matter of text, Section 101(20) specifically recognizes that a person may become liable as an operator by "participating in the management of a vessel or facility," 42 U.S.C. 9601(20)(A) and (E) (Supp. II 1996). That provision denotes that each of the persons that participates in management may be held liable as an "operator" of the facility. See U.S. Br. 22-25.

things, introducing evidence showing that CPC exercised extensive managerial control over Ott II *and* that Ott II's sole business from 1965 to 1968 was the running of the Muskegon site. That evidence showed that CPC's involvement in Ott II's management was so extensive that CPC necessarily exercised operational control over Ott II's only production facility. See *id.* at 8 & n.8, 45-47.[4]

The government was entitled to prove that CPC exercised control over the Muskegon site through the evidence that the government concluded was most persuasive, including evidence that CPC controlled Ott II at a time when, and under circumstances in which, that control necessarily resulted in control of the Muskegon site. See *Old Chief* v. *United States*, 117 S. Ct. 644, 653-654 (1997) (noting general rule that a party "is entitled to prove its case by evidence of its own choice"). There is nothing unusual in the government's meeting its evidentiary burden by introducing indirect or circumstantial evidence, or by introducing several elements of evidence that collectively establish the proposition to be proved. See, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681, 691 (1988).[5]

The district court clearly understood the difference between Section 107(a)(2)'s statutory standard and the government's method of proof. It expressly observed:

> As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decisionmaking at Cordova/California and

[4] The United States also introduced evidence showing CPC's extensive control over Ott II from 1968 to 1972. The government, however, used only evidence relating directly to CPC's involvement in the operation of the Muskegon site. That specific evidence was persuasive for the same reason as the pre-1968 evidence—it showed that CPC exercised managerial control over that site.

[5] Indeed, the lender liability provisions, discussed at U.S. Br. 22-25 and pp. 9-10, *infra*, explicitly recognize the relevance of such evidence. See U.S. Br. 24-25.

> Cordova/Michigan *shows that the parent operated the facility*.

Pet. App. 124a (emphasis added). The district court properly concluded that the government's evidence was probative in meeting the government's burden under Section 107(a)(2).

(c). CPC next argues that a "parent corporation" should not be liable because Congress failed to use that specific term in defining what entities are "persons." CPC Br. 20-21. Congress plainly had no reason to do so. CERCLA's definitional provisions make clear that Section 107(a)(2)'s reference to "any person" includes any "corporation," CERCLA § 101(21), 42 U.S.C. 9601(21), and hence includes both parent and subsidiary corporations. Congress simply meant what it said: A "corporation" would be liable—without regard to its status as a parent or a subsidiary—if the corporation had in fact "operated" the facility in question.

2. CPC attempts to bolster its interpretation of "operator" through novel constructions of related CERCLA provisions. CPC Br. 21-24. CPC's constructions, however, are unpersuasive and ultimately demonstrate that CPC's interpretation is inconsistent with the language and structure of the statute as a whole.

CPC seeks support (CPC Br. 21-22) from Section 101(20)(A)(iii) of CERCLA, which provides that a person may be an operator of an orphaned or abandoned facility if that person "operated[] or otherwise controlled activities at such facility." 42 U.S.C. 9601(20)(A)(iii). As we explain in our opening brief, Congress added that provision to make clear that a person may be an "operator" if the person "controlled activities" at a facility after the facility had ceased operations. U.S. Br. 26-28. Section 101(20)(A)(iii) recognizes that the mere closing of a facility that is releasing toxic chemicals does not eliminate the public health hazards, and it ensures that an entity managing activities at a closed—and therefore technically non-operational—facility may be subject to

liability as an "operator." That provision in no way supports CPC's counter-intuitive proposition that a corporation that controlled activities at a fully operational chemical plant is insulated from "operator" liability. Congress employed the relevant words to eliminate a possible ambiguity, and that "is ample—indeed, admirable—justification for the inclusion of a statutory phrase." *Walters* v. *Metropolitan Educ. Enter., Inc.*, 117 S. Ct. 660, 665 (1997). See U.S. Br. 27-28.

CPC also attempts to distinguish away the lender liability provisions of CERCLA, which create an exemption in the definition of "owner or operator" for "a person, who, without participating in the management of a * * * facility, holds indicia of ownership primarily to protect his security interest in the * * * facility." CERCLA § 101(20)(A), (E)-(G), 42 U.S.C. 9601(20)(A), (E)-(G) (Supp. II 1996). Those provisions are revealing because they provide concrete guidance on Congress's understanding of the contours of CERCLA liability. The provisions indicate that a lender would not be liable as an "owner" by virtue of holding a security interest in the facility, but it could become liable as an "operator"—in accordance with the ordinary meaning of the verb "operate"—by "participating in the management" of a facility. U.S. Br. 22-25.

CPC contends that the government "cannot explain why parties like CPC, who do not hold any 'indicia of ownership' pertaining to a covered 'facility,' should be held liable as *operators* because they do not meet the criterion for an irrelevant *exemption* from *owner* [*sic*] liability." CPC Br. 22. CPC misstates the provision (the lender exemption refers to "owner or operator" liability) and, at the same time, misses the point. We submit that CPC is liable under Section 107(a)(2) because it "operated" the Ott II facility within the ordinary meaning of that word—it extensively participated in the management of that facility. See U.S. Br. 18-22. We cite Section 101(20)(A) as an additional textual indication that the ordinary meaning

of "operated" is the correct one. See *id.* at 22-25. The lender liability provisions make clear that an entity can become liable as an "operator" by "participating in management" and specifically refute CPC's strained notion that the term "operator" should include only some amorphous subset of what CPC calls the "immediate" or "actual physical" operators of the site. See CERCLA § 101(20)(F)-(G), 42 U.S.C. 9601(20)(F)-(G) (Supp. II 1996).[6]

Indeed, CPC cannot explain why Congress would subject a bank to liability for "participating in the management" of an unrelated company's facility, but not a parent that engages in the very same managerial acts with respect to its subsidary's facility. The answer is clear: Congress anticipated that both would be liable. Congress spelled out the specific scope of lender liability in greater detail in response to the request of the banking community, which recognized that some lending activities could fall within the ordinary meaning of "operate" and wanted to eliminate ambiguity over precisely what activities would constitute participation in management and, thus, operation. Cf. *Walters*, 117 S. Ct. at 665.

3. CPC next contends that the government's construction of the term "operate" to encompass managerial control is inappropriate because other federal statutes

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[6] There is no merit to CPC's argument that the 1996 amendments are unenlightening on Congress's intended meaning of the term "operate." CPC Br. 23. As we note in our opening brief, Congress enacted the 1996 amendments as clarifying legislation in response to judicial decisions that raised doubts about the scope of the lender exemption. See 142 Cong. Rec. S11,897 (daily ed. Sept. 30, 1996) (Sen. Smith) ("the language we are adopting today merely clarifies a liability outcome that was already intended by Congress"); *id.* at S11,920 (daily ed. Sept. 30, 1996) (Sen. D'Amato) (the amendment "clarifies and confirms the original secured creditor exemption"). At the same time, Congress did not revise the prevailing rule among the courts of appeals that a parent corporation may be held liable as an operator if it actively participates in, and exercises control over, the operations of a subsidiary's facility. U.S. Br. 28-31 (describing circuit court decisions).

"use 'control' as an explicit criterion for liability." CPC Br. 24. Relying on that contention, CPC embarks on another field trip through the United States Code. *Id.* at 24-25. That expedition avails nothing. Congress has expressed its intention through the ordinary meaning of the term "operate," and Congress's use of other words in other statutory contexts provides no basis for concluding that Congress did not mean what it said here.

4. CPC also relies on legislative history. CPC Br. 26-27. This Court, of course, does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). In any event, CPC's speculations about statutory provisions that Congress did *not* enact yield no reliable guidance. See, *e.g.*, *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 358 (1988). They provide no basis for construing the term "operated" contrary to its ordinary meaning. Compare *Toibb* v. *Radloff*, 501 U.S. 157, 162 (1991). See U.S. Br. 40-41.

B. CPC devotes Part B of its brief to its contention that "CERCLA does not evince clear intent to supplant the state common law of limited liability of corporations." CPC Br. 27-38. CPC's argument once again directs the Court away from the crucial statutory inquiry. CERCLA explicitly imposes liability on any "corporation" that "owned or operated" a facility at which hazardous wastes were disposed of. See CERCLA §§ 101(21), 107(a)(2), 42 U.S.C. 9601(21), 9607(a)(2). Congress has adopted by statute a uniform federal liability standard that should be interpreted and applied according to its plain terms. There is no need or basis for distorting the ordinary meaning of CERCLA's express terms through the introduction of state common law. See U.S. Br. 32-35.[7]

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[7] Contrary to CPC's implications, Congress's imposition of direct liability on a corporation is not inconsistent with state common law. As we note in our opening brief, a parent corporation is not insulated from liability for its *own* acts. See U.S. Br. 33 & n.19; see also, *e.g.*, E.

CPC's basic premise is that Congress must have intended CERCLA to incorporate state common law veil-piercing rules. See CPC Br. 27-30. CPC is simply wrong. CERCLA contains no hint of any intention to incorporate those rules. To the contrary, Section 107(a) sets forth a liability standard that applies "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)." 42 U.S.C. 9607(a). That provision explicitly *precludes* parties from invoking state common law principles to avoid Section 107 liability. The presence of that provision is not surprising. Congress enacted CERCLA in light of the need for a comprehensive federal response to the problem of abandoned waste sites and the *inadequacy* of state law to deal with that problem. See U.S. Br. 40 & nn. 26-27.[8]

There is accordingly no basis for CPC's contention that Congress has left a gap in Section 107(a)(2) that should be filled by a state common law rule of decision. CPC's argument (CPC Br. 27-28) that the United States' interpretation of Section 107(a)(2) represents an attempt to fill that supposed gap with "federal common law" is simply a red herring. See also *id.* at 32-35. Indeed, CPC's reliance on federal receivership cases involving state causes of action, such as *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997); *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), rests on a basic misunderstanding of those cases.

The Court explained in *Atherton* that the term "federal common law" describes "a rule of decision that amounts, *not simply to an interpretation of a federal statute* or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." 117 S. Ct. at 670 (emphasis added). Accord *O'Melveny*, 512 U.S. at 85 ("In answering the central question of displacement of California law, we of course would not contradict an explicit statutory provision."). In this case, unlike *Atherton* and *O'Melveny*, the rule of decision *is* provided by federal statute. The United States simply asks the Court to interpret Section 107(a)(2) according to the ordinary meaning of the statutory terms. CPC's contention is fundamentally flawed because it asks whether a federal common law or state common law rule of decision is appropriate—completely overlooking that it is unnecessary to fashion a common law rule of decision at all.[9]

CPC's remaining arguments in Part B of its brief, which challenge the propriety of applying Section 107(a)(2) as a federal rule of decision, are accordingly beside the point and warrant only a brief response.

1. CPC complains that "the government unjustifiably presumes that CERCLA silently displaces the common law treatment of dual officers." CPC Br. 30-31. CPC

Latty, *Subsidiaries and Affiliated Corporations* 1-2, 77-109 (1936); *id.* at 82-90 (explaining, for example, that a parent may be held directly liable for participating in a tort through its control of a subsidiary); Note, *Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 Harv. L. Rev. 1122, 1123 (1958) ("An individual or corporation acting in a situation involving a corporation related by stock control may incur liability because of that relationship or wholly apart from any consideration of that relationship. The courts often fail to distinguish clearly between the two bases of liability.").

[8] Even in the absence of that provision, there would be no merit to the contention that Congress implicitly adopted state common law. While it is true that this Court "presumes that Congress incorporates the common-law meaning of the terms it uses," it does so only "if those terms have accumulated settled meaning under the common law and the statute does not otherwise dictate." *United States* v. *Wells*, 117 S. Ct. 921, 927 (1997) (internal quotation marks, ellipses, and brackets omitted). Section 107(a)(2)'s relevant term here—"operated"—has no settled common law meaning other than the ordinary meaning supplied by the dictionary.

[9] Indeed, in contrast to *Atherton* and *O'Melveny*, where the Court found that the relevant federal statutes explicitly preserved the applicability of state law except to the extent directly overridden, *Atherton*, 117 S. Ct. at 674-675; *O'Melveny*, 512 U.S. at 86-87, the opposite is true with respect to Section 107(a), which, as we have noted, explicitly limits the use of "any other provision or rule of law." 42 U.S.C. 9607(a).

erroneously assumes such a conflict. Section 107(a)(2) imposes liability on a parent that has actively participated in, and exercised control over, the running of a subsidiary's facility, and the question in each case is whether the evidence demonstrates such involvement. The presence of dual officers may be a relevant evidentiary consideration, just as it may be a relevant factor—as CPC later concedes (CPC Br. 39)—in a common-law veil-piercing analysis. If, for example, dual officers of the parent participate in managing a facility as agents of the parent, then the parent would be liable, even under state common law.[10]

2. Contrary to CPC's contention (CPC Br. 31), we do not at all contend that the "remedial" purposes of CERCLA should override the statutory text. See U.S. Br. 26. Rather, we have noted that our construction—which rests on the ordinary meaning of the key statutory word—is consistent with and implements CERCLA's "object and policy." *Ibid.* (citing *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989)). Congress has expressed its policy judgment through the words that it used in Section 107(a)(2), and this Court should respect that judgment by applying the statute according to the ordinary meaning of its terms.

3. CPC next attempts to distinguish cases in which this Court has recognized that Congress may impose liability without regard to state law principles respecting corporate form. CPC Br. 36-38. Those cases surely involve different statutes and distinguishable facts, but CPC's distinctions miss the point: Congress can and does impose federal liability standards that do not depend on

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[10] See, *e.g.*, Restatement (Second) of Agency § 12 (1958); see also *id.* § 14M cmt.; Latty, *supra*, at 85-86 ("A corporation can only act through its agents; if it manages a project it does so through its agents. If individuals who in one capacity are its agents are found managing an enterprise owned by it, one should have little trouble in inferring that the corporation is managing the enterprise.").

state law principles. In this case, Congress created a liability standard that applies "[n]otwithstanding any other provision or rule of law." CERCLA § 107(a), 42 U.S.C. 9607(a). Congress should be taken at its word. See U.S. Br. 35-39.

C. CPC devotes Part C of its brief to various policy arguments about why interpreting "operated" according to its ordinary meaning would lead to "untenable" results. CPC Br. 38-43. The Court, however, does not sit in judgment of congressional policy and should " 'apply the statute as Congress wrote it.' " *Dunn* v. *CFTC*, 117 S. Ct. 913, 916 (1997). CPC's policy arguments are, in any event, unpersuasive.

1. CPC contends (CPC Br. 38-39) that applying Section 107(a)(2) based on the ordinary meaning of "operated" will result in a "standardless" analysis that "would reach most parent corporations of actual 'operators.' " CPC is wrong on both counts.

Section 107(a)(2) subjects a "person" to liability—without regard to its status as a parent, subsidiary, or individual—if the person "operated" the facility. Construing "operated" according to its ordinary meaning does not make Section 107(a)(2) "standardless." It subjects corporations to the same standard that applies to individuals, partnerships, and other liable "persons." See U.S. Br. 31 n.17. That construction, coupled with the definitions contained in the lender liablity provisions, see *id.* at 24-25, provides concrete guidance by directing courts to examine whether the entity in question actively participated in, and exercised control over, a facility's operations. It also allows courts to take full account of the various factors that demonstrate whether or not a particular entity "operated" a facility. A standard that allows for careful attention to the facts—which CPC disparages as "*ad hoc* analys[i]s" (CPC Br. 38) —is salutary. Courts typically engage in individualized analysis when applying liability standards, and such

analysis is a proper and essential part of the judicial process.[11]

The approach that CPC urges—resort to the individual common law veil-piercing rules of the 50 States—would be no less "*ad hoc*." But it would certainly be far less consistent and predictable. CPC would require the federal courts first to determine the appropriate veil-piercing rule for each defendant under a conflict of laws analysis, then make non-authoritative determinations of the content of the notoriously uncertain state veil-piercing rules, and then apply the appropriate rule to each defendant. Contrary to CPC's portrayal (CPC Br. 40), state common law veil-piercing rules are neither clear, nor consistent, nor necessarily coherent. In this case (which presents a relatively simple CERCLA suit and no conflict of laws dispute), the en banc court was sharply divided over the question of the content of Michigan's veil-piercing rules. Compare Pet. App. 15a-16a with 45a-46a (Ryan, J., dissenting).[12]

There is also no basis for CPC's contention that Section 107(a)(2) "would reach most parent corporations." CPC Br. 38; see *id.* at 40-41. The district court distinguished between the situation in which there is an "investment relationship between a parent and its wholly owned subsidiary" and the situation in which a parent engages in "actual participation and control over a subsidiary's functions and decision-making." Pet. App. 107a. The district court found CPC liable as an operator because the government's factual record "demonstrates the high level of participation required for direct liability to attach to CPC under section 107(a)(2)." *Id.* at 110a.[13]

2. CPC next argues (CPC Br. 41-43) that construing "operated" in light of its ordinary meaning would have the "undesirable consequences" of subjecting CPC—and other entities that directly participated in, and exercised control over, the running of facilities that endanger public health—to liability for the cost of remedying the situation. There is nothing inherently "undesirable," however, in requiring corporations to pay for the harm that they cause. More fundamentally, the policy implications of a liability statute are a matter entrusted to Congress. Section 107(a)(2) expresses the *statutory* policy that those who are actually responsible for creating hazardous conditions—whether individuals or corporations—should bear the cost of response. See U.S. Br. 41.[14]

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[11] See, *e.g.*, *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (noting that "sifting through the details" is part of "the hard task of judging" and that "judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case").

[12] Legal commentators have long recognized that the state "veil-piercing" decisions "defy any attempt at rational explanation." J. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. Chi. L. Rev. 589, 620 (1975). See, *e.g.*, Latty, *supra*, at 5-76; W. Douglas & C. Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L.J. 193, 217 (1929) ("the contents of any rules which may be stated to help in the work of prediction are but shifting and faintly outlined at the best"); Note, *supra*, 71 Harv. L. Rev. at 1123 ("A distressing feature of [veil-piercing] cases is their general failure to articulate reasoned grounds of decision."); see also U.S. Br. 40 n.27.

[13] The courts of appeals have uniformly recognized that a parent or shareholder will be directly liable only upon such a showing. See, *e.g.*, *Aluminum Co. of America* v. *Beazer East, Inc.*, 124 F.3d 551, 562-565 (3d Cir. 1997); see also cases cited at U.S. Br. 28-31. Contrary to CPC's contention (CPC Br. 41), the United States has not advocated that parents may be liable based solely on the presence of dual officers. See U.S. Br. 44. Indeed, the United States has asserted that a parent is directly liable as an operator in only a small percentage of its pending CERCLA cases. The United States asserts a direct liability claim only where it has evidence that the parent exercised actual control over the subsidiary's facility.

[14] CPC's suggestion that subjecting parent corporations to liability will "create[] perverse incentives for parents to exercise less supervision over their subsidiaries" (CPC Br. 41) is contradicted by the facts of this case. As the district court found, CPC's involvement in Ott

3. CPC also contends (CPC Br. 43) that construing "operated" according to its ordinary meaning "would encourage the development of common law veil-piercing based on other statutory terms." CPC creates that parade of horribles out of its own erroneous reasoning. Just as this Court should not import inapposite principles into the CERCLA context (see pp. 4, 11, *supra*), it should also not export CERCLA principles to other inapposite statutory contexts.

D. CPC contends in the final portion of its brief that "CPC cannot be held liable as an 'operator' under any reasonable standard on this record." CPC Br. 43-50. CPC specifically asks this Court to evaluate CPC's liability based, not on the district court's factual findings, but rather on CPC's own view of the evidence. Indeed, CPC's statement of the case relies on its version of the evidence (see *id.* at 3-9) and largely ignores the district court's extensive findings (Pet. App. 58a-100a). That court considered CPC's factual arguments against the entire record and correctly rejected CPC's version of its role at the Muskegon site.[15]

This Court should decline CPC's invitation to resolve CPC's quarrels with the district court's factual findings. The Court granted the United States' petition to resolve a

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II's environmental and regulatory matters resulted in discouraging Ott II from undertaking a pollution control initiative and cooperating with environmental officials. Pet. App. 74a-76a. Contrary to CPC's assertions, subjecting parents to liability for their actions when participating in the management of a subsidiary's facility will create appropriate incentives for encouraging responsible decisions and actions.

[15] Not surprisingly, after a 15-day trial, involving 29 live witnesses, deposition testimony of dozens of others, and more than 2,300 trial exhibits, CPC can selectively cull evidence to portray a different situation from what the district court found. Compare, *e.g.*, Aerojet Br. 6-15. CPC's one-sided presentation does not, of course, establish that the district court's findings are "clearly erroneous." Fed. R. Civ. P. 52(a).

legal question respecting the scope of CERCLA liability, and not to "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). The court of appeals concluded below that the district court had applied an incorrect legal standard, but it did not reject, set aside, or even seriously question the district court's factual findings. See Pet. App. 2a.[16] Accordingly, for purposes of evaluating the legal issue in this proceeding, this Court should treat the district court's findings as conclusive. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

On the decisive legal issue, the Court should reverse the court of appeals' ruling. As we explain in our opening brief, the district court adopted the correct legal standard (U.S. Br. 18-41), and it correctly applied the legal standard to the facts that it found (*id.* at 42-48).[17]

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[16] CPC suggests, through a creative rewriting of the majority's decision, that the court of appeals noted a "dearth of factual support for the district court's broad conclusions." CPC Br. 44. That is inaccurate. The court of appeals did not contest the district court's factual findings; it simply indicated that additional facts would be needed to support liability under the court of appeals' legal standard. See Pet. App. 12a ("If anything, the facts recited by the district court support liability under the latter standard but not under the former."); *id.* at 16a-17a. The same holds true at the other pages CPC cites. See *id.* at 12a, 18a, 21a-22a, 24a.

[17] Whether the Court reverses or affirms the court of appeals' judgment, it may remand the case for further proceedings. If the Court reverses, CPC may be entitled to renew any undecided contentions respecting the district court's findings that it previously raised in the court of appeals. If the Court affirms, the United States may be entitled to an opportunity to establish liability under the standard the Court announces.

III. Aerojet Raises Issues That Are Not Properly Before This Court

Aerojet does not contest that a parent corporation may be found directly liable as an operator under CERCLA without piercing the veil. Aerojet Br. 24-27. Aerojet contends, however, that it cannot be held liable because, in its view, neither Aerojet nor its subsidiaries disposed of hazardous substances during their operation of the facility. *Id.* at 27-36. Aerojet also contends that it is entitled to the third-party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3). Aerojet Br. 38-46.

Our foregoing reply to CPC also answers Aerojet's arguments about the particular standard that should be employed here. The other issues that Aerojet raises are not properly before the Court. Those issues, both of which were remanded to the district court for further evaluation and factual findings with respect to Aerojet's subsidiaries (Pet. App. 22a-24a), are not related to the question on which this Court granted certiorari. Although we believe that the district court made ample findings to support liability against Aerojet and its subsidiaries, the Court has no need to reach the remanded issues to resolve the question that has been presented for review. See *Regents of the University of California* v. *Doe*, 117 S. Ct. 900, 905 (1997); see also *Caterpillar, Inc.* v. *Lewis*, 117 S. Ct. 467, 473 n.7 (1996).[18]

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MARCH 1998

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[18] Contrary to CPC's implication (CPC Br. 9 n.2), the United States has not entered into a settlement agreement with Aerojet and remains in an adversary posture with respect to both Aerojet and CPC.

Supreme Court, U.S.
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No. 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT BESTFOODS

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SUPPLEMENTAL BRIEF FOR RESPONDENT BESTFOODS

Aerojet-General Corporation and its Cordova subsidiaries (collectively, "Aerojet") have admitted that they are not adverse to the United States and Michigan in any significant way. Aerojet Br. in Opp. 4 & n.1, 12. Aerojet nevertheless has submitted a brief at the time appropriate for *defending* the judgment under review, but has addressed the question presented primarily to argue that the judgment should be *reversed* as to respondent Bestfoods (formerly CPC International Inc.). Bestfoods submits this Supplemental Brief pursuant to Rule 25.5 in order to respond to the arguments for reversal in Aerojet's brief, which were not available at the time Bestfoods submitted its response to the other briefs arguing for reversal.[1]

1. Contrary to its position below, Aerojet now finds nothing to criticize in the legal standard applied by the court of appeals, but disputes only whether "the court of appeals correctly applied the direct liability theory to CPC." Br. 26 n.10. But see, *e.g.*, Aerojet C.A. Br. as Appellee 28-36; see also U.S. Br. 48 (noting Aerojet's position below). But Aerojet never argued in the lower courts that CPC could be held liable under the Sixth Circuit's standard of operator liability. Thus, Aerojet did not contend, as it does now, that CPC operated the Muskegon facility directly, but rather accused CPC of being an operator through the "mechanism" of Ott II. Aerojet C.A. Br. as Appellee 32 n.19. Moreover, Aerojet sharply rejected (*ibid.*) any "distinction between operation of a subsidiary corporation and operation of" a facility as defined in 42 U.S.C. § 9601(9).

If this Court agrees that the court of appeals used the correct legal standard, it is unlikely to expend its scarce resources to second-guess the Sixth Circuit's application of that standard to the voluminous record in this case. The Court long has emphasized that it does not sit to "review evidence and

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[1] As it did in its principal brief to this Court, Bestfoods hereafter refers to itself using its former name, "CPC."

discuss specific facts" in response to a claim that a lower court has misapplied a correct rule of law. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Moreover, even if this Court were to adopt a new legal standard to resolve the question presented here, the proper course would be to remand the case for reconsideration by the Sixth Circuit. See, *e.g.*, *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 558 (1994). That course is particularly appropriate where, as here, the court of appeals has not yet had reason to engage in full clear-error review of the district court's extensive factual findings. See Bestfoods Br. 43-45.

2. If, however, the Court does endeavor to decide whether the evidence can sustain the judgment under the correct legal standard, it should not be misled by Aerojet's fanciful view of the record. To expose every gross misstatement would consume a full-length brief. Suffice it to point out that neither court below adopted the vast majority of Aerojet's contentions. A few glaring errors require special response.

a. To begin with, contrary to Aerojet's assertion (Br. 36 n.12), the district court did *not* find that CPC directly conducted the day-to-day operations at the Muskegon facility in the sense of direct operation understood by the Sixth Circuit and supposedly endorsed now by Aerojet.[2] To the contrary, the district court's sole reference to "day-to-day operations" identified "CPC's involvement • • • *through CPC officials who served within Ott II management*" (Pet. App. 111a; emphasis added) — the very tautological fallacy, effectively presuming veil-piercing in order to find it, that we exposed in our principal brief (at 30-31). Aerojet's argument thus reflects an implicit endorsement of the district court's (and the government's) legal analysis — at least when that analysis is being applied to CPC. Aerojet also tries to leapfrog Ott II's existence by stating inaccurately that "CPC took over Ott [I]" in 1965. Br. 6; see also Br. 9. In fact, CPC never owned either the Muskegon site

[2] By contrast, the district court headed a section of its opinion: "Aerojet's direct involvement with the site." Pet. App. 94a.

or any other assets of Ott I; that property belonged to a separate subsidiary corporation, Ott II. Pet. App. 65a-67a.

b. Aerojet goes further astray in exaggerating (Br. 9-10) the role of CP Development in relation to Ott II.[3] Aerojet maintains (Br. 9) that the "Development Company's board of directors functioned as the board for Ott [II]." That fabrication is entirely at odds with the pertinent findings of the district court that "[t]he Ott II board of directors was an active board" that "functioned as a major source of power and decision-making." Pet. App. 67a. No findings referred to a "Development Company[] board of directors."

In our principal brief (at 4), we explained the actual function of CP Development, a division of CPC that had minimal staffing. See C.A. App. 3326; see also *id.* at 3331-3333. We add here only that the evidence showed both that Ott II was free to accept or reject CP Development's substantive recommendations (C.A. App. 3339-3340; Tr. 599-600, 1410-1414) and that Ott II's participation in CP Development's efforts to encourage technological interaction among the CPC subsidiaries was negligible. C.A. App. 2866-2867; Tr. 356-357, 1231, 1315, 1430-1431; Eiszner Dep. 111-114.

In addition, Aerojet omits a key fact in its misleading description of the involvement with Ott II of Beverly Warner, who was president of CP Development beginning in 1969: Warner also was *CEO of Ott II* from 1970 to 1972. Pet. App. 70a-71a. Aerojet's suggestion (Br. 9) that, merely in his role as president of CP Development, Warner made "pricing decisions, production decisions, and scheduling decisions" for Ott II certainly would have come as news to Warner. Warner testified that, when he was president of CP Development but not yet CEO of Ott II, he "didn't have anything to do with prices[,] • • • didn't have anything to do with [Ott II's] customers[,]

[3] Aerojet comes late to this mistaken belief. It told the court of appeals that "CPC permitted Ott [II] to function essentially as it had before the acquisition by CPC." Aerojet C.A. Br. as Appellee 6. See Pet. App. 65a-67a.

[and] didn't have anything to do with [Ott II's] improvements in [its] manufacturing process." Warner Dep. 33.

c. Aerojet also attempts (Br. 13-14) to inflate CPC's involvement with Ott II environmental matters by citing every scrap of paper reflecting any attention by CPC personnel to Ott II environmental issues during Ott II's seven years of operation. The cited memoranda speak for themselves. Most reflect contacts that had nothing to do with the Ott II waste disposal program or its negotiations with the MWRC over compliance issues, but reveal only incidental legal and administrative services that CPC provided to Ott II. The record actually pertinent to Ott II environmental matters discloses that the *Ott II management and board* made all substantive decisions about waste disposal and that the relevant technical recommendations — which Ott II followed without material exception — came from Ott II's outside consultants, not from CPC. See Bestfoods Br. 7; Pet. App. 69a.

Like the government, Aerojet tries to transform G.R.D. Williams — a lawyer-lobbyist with no technical expertise whose responsibilities involved the politics of dealing with regulators but did not extend to determining or influencing technical solutions (C.A. App. 3269) — into some kind of environmental czar. Although our principal brief (at 47-49) explained Williams' limited involvement with Ott II, some of Aerojet's misstatements require a further response.

Aerojet's assertion (Br. 10) that "CPC required Ott [II] personnel to check with Williams (or other CPC officials) before answering questions about Ott's environmental compliance" overlooks the long history of meetings with the MWRC, the agency that affected the substance of Ott II's disposal program, that did not involve Williams in any way.[4] See

[4] Aerojet's contention that "[a] CPC official on Ott's Board *directed* Ott to contact Williams for help with Ott's disposal problems" (Br. 11; emphasis added) illustrates its liberties with the record. Setting aside the lack of evidence that Williams had any ability to "help with • • • disposal problems," the record shows that the Ott II board member "*suggested* that G.R.D. Williams of CP be consulted," and specifically recommended contacting Williams *"to learn how a similar problem was handled at Pekin"* (C.A. App. 2004, 2017 (emphasis added)).

Bestfoods Br. 7, 48. Ott II's occasional communications with Williams — the parent corporation's specialist in government relations regarding environmental affairs — did not have even an attenuated effect on the waste disposal practices at issue here.

Equally spurious is Aerojet's claim (Br. 12) that "Williams managed to save money for CPC in its operating units by delaying environmental management at Ott" because "Ott never built a biological waste treatment facility," although its consultant had suggested building one "by 1970." To begin with, the consultant's "1970" estimate was based on a prediction that federal surface water pollution standards eventually would require Ott II to provide additional treatment of wastewater discharged into the Muskegon River (C.A. App. 2133) — discharges that are not at issue here. By 1970, moreover, Ott II was negotiating for the use of the Muskegon County wastewater treatment plant, and had no reason to duplicate those treatment facilities on-site. See Pet. App. 76a.

d. Finally, Aerojet casts aspersions on the sale of the Ott II site and business to Story, an approach that persuaded neither of the courts below. Contrary to Aerojet's contention (Br. 14), there was no evidence that the Muskegon site presented a "serious environmental liability" in 1972, especially because the purge wells developed by Ott II continued in operation. Indeed, there was no liability at all: the enactment of CERCLA was eight years in the future, and no other type of liability was on the horizon. It also bears emphasis that the distribution as a dividend of the $6.6 million cash assets of Four Lakes (*i.e.*, Ott II; see Aerojet Br. 14) — which no longer had operations, tangible assets, or outstanding liabilities — should scarcely raise questions, particularly in light of the $5 million in capital advances that CPC had made to Ott II over the years. See Pet. App. 77a; Ex. 805 (also noting $4 million price of Ott I assets

in 1965). Aerojet's further contention (Br. 14) that the presence of Warner on Story's board amounted to an "interest in Story" that "CPC retained" is simply absurd.

* * * * *

One can only speculate as to the reasons why Aerojet, a party that prevailed below and that has, by its own admission, virtually no interest in the outcome of the question presented, has chosen to file a brief seeking reversal of the judgment below in favor of CPC. In any event, as the Sixth Circuit recognized (Pet. App. 17a-18a), the types of activities on which Aerojet relies do not show that CPC "directly operate[d] the [Muskegon] facility itself."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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UNITED STATES OF AMERICA,
Petitioner

vs.

CPC INTERNATIONAL, INC., et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENTS AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY

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SUPPLEMENTAL BRIEF OF THE CORDOVA RESPONDENTS

Aerojet-General Corporation, Cordova Chemical Company, and Cordova Chemical Company of Michigan ("the Cordova Respondents") submit this Supplemental Brief under Rule 25.5 to address two new matters arising after the filing of their Brief. The first new matter is this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1998 U.S. LEXIS 1599 (1998). The second is CPC's false accusation in its Supplemental Brief that the Cordova Respondents have misstated the record.

I. On March 4, 1998, this Court issued its opinion in *Oncale v Sundowner Offshore Services, supra*. *Oncale* involved the interpretation of Title VII of the Civil Rights Act of 1964, but the straightforward approach to statutory interpretation taken by this Court in *Oncale* is equally applicable here. In *Oncale*, the question presented to this Court was whether workplace harassment could violate Title VII's prohibition against "discrimination. . . because of. . . sex" when the harasser and the harassed employee are of the same sex. *Oncale*, 1998 U.S. LEXIS at *3. This Court unanimously held that it could, and in so doing rejected two errors. First, this Court refused to read into the statutory text a liability exception for same sex harassment that Congress itself did not include. *Id.* at *7. Second, the Court refused to isolate any one element of a statutory liability standard that by its terms includes multiple elements. In particular, the Court emphasized that the statute in *Oncale* did not prohibit all workplace harassment, but only harassment or other discrimination "because of. . . sex". *See, e.g., id.* at *8, *9; *id.* at *12-13 (Thomas, J. concurring).

In this case, the Court is presented with the question of whether, and under what circumstances, a parent corporation may

be held directly liable under §107(a)(2) of CERCLA for pollution at a site where its subsidiary conducted business. The answers proposed by the United States, on the one hand, and by CPC, on the other hand, commit the same errors just rejected in *Oncale*.

The United States improperly attempts to isolate only one element of a multiple element liability test created by the statutory text of §107(a)(2). Thus, according to the United States, CPC and Aerojet are liable under §107(a)(2) if they "operated" facilities at the Muskegon site, apparently without regard for whether they did so "at the time of disposal of any hazardous substance." *See* United States Reply Brief at 2 (construing "Section 107(a)(2) to impose direct liability on a 'person,' whether a corporation or an individual, if the person actively participated in, and exercised control over, the running of a facility."). By isolating only one word of the liability imposing statute, the United States commits the same error this Court rejected in *Oncale* by responding to those who isolated the term "discrimination" from the qualifying phrase "because ... of sex." In Section 107(a)(2) of CERCLA, Congress created liability for operators, but only those operators who operated facilities "at the time of disposal of hazardous substances," a qualifying phrase the government ignores.

CPC commits the other error rejected by this Court in *Oncale*: namely, the error of reading into the statutory text a blanket exception from liability that Congress itself did not include. CPC properly rejects the test proffered by the United States, but in proposing its own test for parent corporation liability under §107(a)(2), CPC as a practical matter equates the limits of federal statutory liability with state law veil-piercing, thereby creating an unarticulated liability exemption for most parent corporations. By reading into Section 107(a)(2) a special, categorical protection for parent corporations that Congress itself did not include, CPC commits the same error this Court rejected

in *Oncale* by responding to those who argued that the statutory terms "discrimination ... because of ... sex" implied a categorical exclusion for same sex harassment.

This Court should require the same "careful attention to the requirements of the statute" in cases under §107(a)(2) that it demanded in *Oncale* and hold that parent corporations can be liable as operators under §107(a)(2), but only where the nexus between such a corporation and the pollution at the facility has been established, as required by the plain terms of the statute.[1] The Cordova Respondents respectfully submit that they are the only parties before the Court that have offered a liability test that honors the text, the legislative history, and policy of the statute.

II. The supplemental brief of CPC accuses the Cordova Respondents of "fabricat[ing]" (at 3), "exaggerating" (at 3) or otherwise misstating the record (at 2, 3, 4 n.4, 5 and 6). These accusations are false. The Cordova Respondents have done

[1]The United States tacitly acknowledges the importance of this nexus at two points in its Reply Brief, even though it formally maintains that the Court need not reach the question posed by the Cordova Respondents of whether any "disposal" occurred during the tenure of the Cordova Respondents. The United States asserts that "CPC and Aerojet are liable precisely *because* the factual record shows that they directly participated in the operational decisions **that caused the hazardous condition at the Muskegon site**." (United States Reply Brief at 3 (italics original; bold added).) Similarly, the United States claims that §107(a)(2) authorizes recovery "from those entities that exercised managerial control over the running of the facility and the day-to-day decisionmaking **that created the hazardous situation**". (*Id.* at 6 (emphasis added).) These statements from the government beg precisely the question the government urges this Court to ignore: namely, whether any operations of the Cordova Respondents caused contamination at the site or, in the language of the statute, whether the operations occurred "at the time of disposal of any hazardous substance." The Cordova Respondents did not cause contamination at the site, and the district court did not find to the contrary. (Brief of the Cordova Respondents (at 3-5).) Indeed, the government's own witnesses acknowledge that the Cordova Respondents did not cause contamination at the site. (*Id.* at 4-5.)

nothing other than highlight the findings and evidence in the record supporting a judgment of liability against CPC based on its own activities at the site.[2]

A. CPC complains about the Cordova Respondents' reference to the district court's finding that CPC engaged in both major policy-making and day-to-day operations at its subsidiary's site. (CPC Supp. Brief at *2*). The Cordova Respondents have not in any way misrepresented the record. The district court concluded as a matter of fact that CPC did involve itself in both policy-making and day-to-day operations. *See* Pet. App. at 67a (CPC's involvement in policy-making decisions); 69a (CPC's involvement in day-to-day decision-making); 71a (CPC's involvement in its subsidiary's decision-making "created controversy and strains within the subsidiary"); 72a (CPC's development company helped "shape decision and affect personnel changes" at the subsidiary); 74a, 111a (summarizing and applying factual findings). CPC attempts to discount the

[2] CPC's suggestion that the Cordova Respondents are "not adverse to the United States and Michigan in any significant way" (CPC Supp. Brief at 1) is absurd. *See also* Reply of the Cordova Respondents in Support of Motion for Divided Argument (discussing the adversity of the parties, including CPC, the Cordova Respondents and the government, throughout the litigation). Like Respondent CPC, the Cordova Respondents have vigorously contested their liability at every stage of this litigation. Moreover, like respondent CPC, the Cordova Respondents have asserted that the government's proposed "participation and control" standard is an erroneous construction of CERCLA § 107(a)(2) that confuses two analytically distinct theories of liability: namely, a derivative liability theory that must be premised on state law principles of corporate veil piercing, and a distinct direct liability theory that depends upon a faithful application of CERCLA's statutory text. (Cordova Brief at 1-2, 22-23, 24-27.) The Cordova Respondents do, however, believe that CPC's conduct at the site subjects it to liability consistent with both the text and policy of § 107(a)(2), (*Id.* at 26 n. 10), a position the Cordova Respondents have maintained throughout this litigation.

findings by alleging that the district court made them only by assuming that CPC's veil should be pierced, but this insinuation flies in the face of the district court's express reservation of the question of piercing CPC's veil. (Pet. App. at 112a.) CPC may not like the factual findings highlighted by the Cordova Respondents, but it cannot credibly ignore them.

B. CPC alleges that Aerojet "fabricat[ed]" its description of the CPC development company's role at the Ott site (CPC Supp. Brief at 3), but this allegation ignores both the district court's express factual findings and the specific citation of the Cordova Respondents to the record. The district court found as a matter of fact that CPC used its unincorporated development company to implement its will at the Ott site. (Pet. App. at 72a-74a, 111a.) Moreover, Dr. Garber, a participant in the board of directors of the CPC development company, expressly testified in his deposition that the directors of the development company board functioned as the directors of the operating companies themselves:

> Q. In your judgment, was this gathering of people [the development company board] the group that functioned more as the directors of the operating companies [one of which was Ott II] than the formal directors of the operating companies themselves?
>
> A. I would say so, yes.

(JA: 2922, Garber Dep. at 37.) Again, CPC may not like the record, but this is what it contains.

C. CPC next contends that the Cordova Respondents exaggerated the role of a CPC executive, G.R.D.

Williams, at the Ott site. (CPC Supp. Brief at 4-5.) But once again, the Cordova Respondents simply recited record evidence supporting an explicit finding of the trial court. The district court concluded that Mr. Williams of CPC directly intervened in Ott's affairs to prevent Ott from disclosing to State regulators a plan for construction of a biological waste treatment plant:

> In the meeting with the Water Resources Commission, Williams participated in discussions, which, *as a result of his influence,* did not include presentation by Ott II of plans for a biological waste treatment facility. Williams did not feel that Ott II should mention the option because he did not think it would be needed as a waste disposal alternative.

Pet. App. 75a (emphasis added). Even though Ott's own Vice President of Manufacturing and Ott's own private consultant recommended the biological treatment plant, the evidentiary record demonstrates that Mr. Williams' judgment prevailed. Ott never built the treatment plant. (JA: 3286, Hellman, Tr. at 1367; JA: 3404, Newhof, Tr. at 1112.) Mr. Williams later reported to his superiors at CPC that he hoped this would save the company $350,000. (JA: 2180, 2182, December 1, 1966, Williams Progress Report, at 3.)

D. CPC next labels as "absurd" the contention of the Cordova Respondents that CPC retained an equity interest in Story Chemical following the sale of Ott II. (CPC Supp. Brief at *6*.) Once again, CPC's rhetoric ignores the record. CPC sold Story in exchange for $6.6 million in cash *and* $4 million of convertible subordinated debt. (Pet. App. 78a; JA: 2407, March 15, 1976, Agreement between CPC and Story.) This effectively gave CPC an equity stake in Story,

and it is for that reason that CPC placed one of its executives, Beverly Warner, on the board of Story Chemical. CPC ultimately exchanged the convertible subordinated debt for Story's promise not to hold CPC liable for Story's mounting obligations. (JA: 2407, March 15, 1976, Agreement Between CPC and Story.)

ACCORDINGLY, the Cordova Respondents urge this Court to conclude under the plain language of § 107(a)(2) that Aerojet cannot be liable because it did not operate facilities at a time of disposal at the site, but that CPC can be liable—not because it participated in managing its subsidiary—but because it directly operated facilities at a time those facilities were polluting the site owned by the CPC subsidiary.

Respectfully submitted,

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UNITED STATES OF AMERICA,

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v.

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On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF MINNESOTA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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STATEMENT OF INTEREST

The amici curiae states (Amici States), through their attorneys general, respectfully submit this brief in support of Respondent Michigan Department of Environmental Quality. Amici States support reversal of the decision of the Sixth Circuit Court of Appeals holding that, where a release occurs from a subsidiary's facility, a parent corporation is not liable as an "operator" for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* (1994) (CERCLA), unless liability can be imposed under the common law doctrine of piercing the corporate veil.

Amici States have a strong interest in the implementation of CERCLA and the scope and interpretation of CERCLA's liability provisions. Protection of public health and the environment from the polluting effects of uncontrolled releases of hazardous substances is a responsibility of federal and state government. States play a major administrative and financial role in responding to releases within their borders. The principal federal law on this subject is CERCLA. In addition, most of the states have enacted their own cleanup laws, which generally mirror the elements of CERCLA, including imposing liability for cleanup costs on a broad spectrum of persons connected to the releases.

States rely on both federal and state cleanup laws in carrying out their cleanup responsibilities, and especially in recovering state cleanup costs from those legally responsible for the releases. By directly affecting the application and interpretation of CERCLA, and indirectly

affecting parallel state cleanup laws, federal court interpretations of CERCLA's liability and cost recovery provisions have important legal, financial and practical implications for states. Thus, states have a very important interest in an interpretation of the CERCLA liability provisions that enhances and preserves the vitality of CERCLA's cost recovery remedy. The Sixth Circuit's unduly narrow approach to construction of CERCLA's liability provisions is at odds with the language and purposes of the statute and threatens the vitality of CERCLA's cost recovery remedy, which is critical to the success of the national effort to clean up hazardous waste releases.

SUMMARY OF ARGUMENT

This case involves interpretation of the operator liability provisions of CERCLA and application of those provisions to a parent corporation that actively participates in the management of a subsidiary whose facility is the source of a release. The scope of interpretation given to CERCLA's liability provisions may significantly affect the financial and administrative obligations of states in addressing cleanup of releases. Amici States urge the Court to adopt a broad interpretation of the CERCLA liability provisions that is consistent with the text and purposes of the statute, and that is followed by the majority of the courts of appeals that have decided this question.

The term "operator" is not separately and expressly defined in CERCLA. Interpreting "operator" under CERCLA to include any person who actively participates

in the management of a business or other entity where a release occurs is in accord with the ordinary and natural meaning of the word "operator," with implications about the meaning of "operator" that can be discovered in the text of CERCLA, and with the larger context of the CERCLA liability provisions, which are based on many broadly defined terms.

Applying CERCLA cost recovery liability to a parent corporation whose actions make it an "operator," as broadly and properly construed under CERCLA, advances the underlying purpose of the statute to assure that responsible persons, rather than the public, should bear the cost of cleanup. The correctness of this interpretation and the resulting rule of liability is confirmed by the broad remedial purpose of CERCLA. That remedial purpose is found in the statute's general goal of protecting public health and the environment. It is further reflected in the more specific goals of remedying the effects of past releases of hazardous substances, and creating new statutory remedies to assign liability for cleanup.

ARGUMENT

I. AN UNDULY NARROW JUDICIAL INTERPRETATION OF THE CERCLA LIABILITY PROVISIONS WILL IMPOSE GREATER ADMINISTRATIVE AND FINANCIAL BURDENS ON STATES.

Judicial interpretations of CERCLA that unduly narrow the scope of statutory cleanup liability not only undermine the clear purpose of the statute that those

responsible for hazardous substance releases should bear the burden of cleanup costs, but also significantly affect states by shifting cleanup costs and responsibilities from responsible persons to states and their taxpayers. Uncontrolled releases of hazardous substances pose a massive environmental problem, causing pollution of the nation's air, land, and water, and threatening the health of its citizens. CERCLA, together with state cleanup laws, provides the legal framework for states to respond to this problem.

CERCLA provides powerful legal authorities to the President to select, enforce and oversee response actions to address the highest priority releases throughout the country. *See* 42 U.S.C. §§ 9604, 9605, 9606 (1994). CERCLA also provides a federal source of public funding for cleanups (the "Superfund" for which the cleanup program is named), and provides a broad system of statutory liability by which cleanup costs incurred by the federal government and by states can be recovered from those responsible for the release. *See* 42 U.S.C. § 9607 (1994), *amended by* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2502(a), 110 Stat. 3004-462 to 3004-464 (1996); and 42 U.S.C. § 9611 (1994).

CERCLA includes an important role for the states in implementating and funding cleanups under the federal Superfund program. Under cooperative agreements with the United States Environmental Protection Agency (EPA), states may take many of the response actions which the President is authorized to take under CERCLA. *See* 42 U.S.C. § 9604(d) (1994). By 1991, all fifty states had entered into some type of cooperative agreement to take actions authorized under CERCLA, effectively creating a

partnership between states and the federal government to address the national cleanup problem. Office of Emergency and Remedial Response, United States Environmental Protection Agency, *An Analysis of State Superfund Programs: 50-State Study*, 1991 Update, Pub. No. 9375.6-08B (1991), Table V-6, 75-77 (*EPA 50-State Study*).

States also must agree to shoulder significant financial and administrative obligations before EPA can take federally-funded remedial actions. Specifically, states must agree to assure payment of 10 percent of remedial construction cost and assure performance of all operation and maintenance. 42 U.S.C. § 9604(c)(3) (1994). Because federally-funded cleanups address the most seriously contaminated sites in the nation – those listed on the National Priority List under 42 U.S.C. § 9605(a)(8)(B) (1994) – these cleanups are often very expensive and complex. Thus, the state share of remedial cost and the administrative obligations for operation and maintenance of federally-funded cleanups can be substantial. An unduly narrow interpretation of the scope of CERCLA cleanup liability will shift a greater share of the financial and administrative burdens of cleanup from responsible persons to the states.

The legal framework for responding to hazardous substance releases also includes state cleanup laws enacted by at least thirty-six states to authorize state participation in the federal cleanup program and to empower states to respond to sites not listed as the highest national priorities for cleanup. *See* Robert B. McKinstry, Jr., *The Role of State "Little Superfunds" In Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, Vill. Envtl.

L. J. 83, 84-85 n.3 (1994). Most of these state cleanup laws are similar to CERCLA in their key provisions relating to liability, enforcement and funding. *See McKinstry, supra,* at 85; and *EPA 50-State Study, supra,* at 32-33. States incurring costs for federal and state cleanups may use CERCLA as their principal legal basis for recovery, as a supplement to state liability laws or, by citing CERCLA case law, as authority to support interpretation of comparable state liability laws. Thus, any judicial holding that construes CERCLA liability too narrowly may diminish the ability of states to recover state cleanup costs under CERCLA and under state laws patterned after CERCLA. In both cases, states rather than responsible parties will end up bearing more of the cleanup costs and responsibilities, and some hazardous substance releases may go unremedied.

II. THE LANGUAGE, STRUCTURE AND PURPOSES OF CERCLA SUPPORT IMPOSITION OF OPERATOR LIABILITY ON PARENT CORPORATIONS THAT ACTUALLY PARTICIPATE IN THE MANAGEMENT OF THEIR SUBSIDIARIES.

The central question in this case is who is an "operator" under CERCLA and, more specifically, whether and under what circumstances a parent corporation may be considered an "operator" and therefore liable for the cost of remedying a release from a subsidiary's facility. The Sixth Circuit decided this question erroneously. The Amici States urge the Court to approve the rule adopted by the majority of the courts of appeals that have decided this question: that a parent corporation is liable for cleanup costs as an operator under CERCLA when it

exercises actual control or actively participates in the management of its subsidiary whose facility is the source of a release. For the reasons given below, this rule of operator liability under CERCLA best comports with the text and structure of the statute, the underlying policies which the statute embodies, and the overall remedial purpose of CERCLA.

A. A Broad Interpretation Of "Operator" That Includes A Parent Corporation That Participates In The Management Of A Subsidiary Is Consistent With The Text And Structure of CERCLA.

The language and structure of CERCLA show that key terms used by the statute, particularly the words used to describe the problems to be remedied and those who may be held liable for cleanup costs, are intended to be construed broadly. CERCLA imposes liability for the costs of removal or remedial action which are incurred to address a release of a hazardous substance from a facility. 42 U.S.C. § 9607(a) (1994). Each of the key terms, "release," "hazardous substance," and "facility," along with other important terms used in the CERCLA liability provisions, are very broadly defined in CERCLA. 42 U.S.C. § 9601 (1994), *amended by* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2502(b), 110 Stat. 3009-464 to 3009-467 (1996).

For example, "release" includes a wide range of active and passive methods by which polluting substances may enter the environment, such as "spilling, leaking . . . escaping . . . leaching, dumping or disposing."

42 U.S.C. § 9601(22) (1994). "Hazardous substance" is defined as any substance designated as hazardous under CERCLA or any of four other environmental statutes. 42 U.S.C. § 9601(14). This definition "covers a vast array" of substances, including over 700 hazardous substances listed pursuant to CERCLA alone. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1200 (2d Cir. 1992). "Facility" is defined to include not only a long list of specific types of structures or equipment such as buildings, pipelines, wells, pits, and storage containers, but also to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located." 42 U.S.C. § 9601(9) (1994).

Likewise, CERCLA identifies a wide range of persons who are liable for cleanup costs, including facility owners and operators, those who arranged for disposal of hazardous substances, and transporters of hazardous substances to the facility. 42 U.S.C. § 9607(a)(1)-(4) (1994). The class of liable persons includes all present owners and operators of the facility where the release occurred, and all who owned or operated the facility at the time of disposal of a hazardous substance. 42 U.S.C. § 9607(a)(1) and (2) (1994). These examples show that Congress intended to cast a very wide net of liability by broadly defining the key terms used in CERCLA's liability provisions. The meaning of the term "operator" must be considered in this context as another key term in the broadly defined CERCLA statutory liability system.

However, the meaning of "operator" under CERCLA is not as easy to determine as most of the key terms used

in CERCLA. CERCLA does not define the term "operator," but rather defines the term "owner or operator." That definition provides in pertinent part as follows:

> The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person, owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or *otherwise controlled activities at such facilities immediately beforehand*. Such term does not include a person, who, without *participating in the management of a vessel or facility*, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A) (1994) (emphasis added).

This largely circular definition of "owner or operator" offers important, but limited, guidance in determining what the term "operator" means. For example, with respect to certain facilities that have reverted to state or local control, "owner or operator" is defined as the immediately prior owner or operator, including one who "otherwise controlled activities at such facilities immediately beforehand." This language implies that control of activities at a facility is a sufficient basis to determine that a person is an owner or operator. Similarly, in excluding certain holders of secured interests from the definition of "owner or operator," CERCLA limits the exclusion to

those who hold such indicia of ownership "without participating in the management of a . . . facility." Thus, by implication, participating in management is a factor in determining a person's status as "owner or operator." *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985).

The most recent amendments to the CERCLA definition of "owner or operator" offer some further assistance in construing the term "operator." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2502(b), 110 Stat. 3009-464 to 3009-467 (1996), to be codified at 42 U.S.C. § 9601(20)(E)-(G). Similar to the pre-existing secured interest holder exclusion, these amendments exclude from liability a "lender, that *without participating in management* of a vessel or facility, holds indicia of ownership primarily to protect the [lender's] security interest. . . . " *Id.*, 110 Stat. 3009-464, to be codified at 42 U.S.C. § 9601(20)(E)(i) (emphasis added). The amendments go on to describe several levels of activity that will be considered participation in management by a lender. *Id.*, 110 Stat. 3009-465 to 3009-467, to be codified at 42 U.S.C. § 9601(20)(F)-(G). These activities range from the exercise of narrow authority to control specific environmental compliance matters related to a facility, to the exercise of more general authority to "control at a level comparable to that of a manager . . . such that the person has assumed or manifested responsibility . . . over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the . . . facility other than the function of environmental compliance." *Id.*, 110 Stat. 3009-465, to be codified at 42 U.S.C. § 9601(20)(F)(ii). The term "operational function"

is further defined to include "a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer." *Id.*, 110 Stat. 3009-467, to be codified at 42 U.S.C. § 9601(20)(G)(v).

While these lender liability provisions apply only in the unique context of a lender who may come to possess and operate a facility of a debtor by exercise of its rights as a creditor on a defaulted loan, the language is instructive about what operational activities are sufficient to negate a lender's exclusion from CERCLA liability. A lender will lose its liability exclusion and become liable as an "owner or operator" if its actions are like those of an operations manager or chief executive officer of the debtor, even if those actions do not include management of environmental compliance or practices. The clear implication of this language is that those who actually manage or control the operations of the entity or business where a release occurs are liable for cleanup costs under CERCLA.

Thus, while the CERCLA definition of "owner or operator" provides important clues to the meaning of the term "operator," it lacks any express language from which to determine the meaning of the term. For this reason, the Court should look to the "ordinary and natural" meaning or use of the word "operator" when construing this term in CERCLA. *See Bailey v. United States*, ___ U.S. ___, 116 S. Ct. 501, 506-507 (1995) (using ordinary and natural meaning in construing a statute criminalizing the use of a firearm related to a drug trafficking offense). Ordinarily, "to operate" means "to conduct the affairs of;

manage; *operate a business.*" American Heritage Dictionary of English Language, 1268 (3d ed. 1992) (emphasis in original).

Hence, in the ordinary meaning of the term, an "operator" is a person who manages or conducts the affairs of a business or other entity. This broad definition is consistent with what can be learned by implication from the CERCLA definition of "owner or operator," including the recent lender liability amendments. It is also consistent with the statutory context in which key terms of the CERCLA liability provisions are broadly defined.

Therefore, as used in CERCLA, "operator" should include any person that manages or actively participates in the operational affairs of a business or other entity whose facility is the source of a release or threatened release. Nothing in CERCLA precludes the application of this definition of "operator" to any person whose actions meet the statutory test. Thus, nothing in CERCLA excludes a corporation from liability as an operator because it is a parent corporation to a subsidiary where the release occurred. *See United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) ("Our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA"). All that CERCLA requires is a factual showing that the parent corporation actually controlled or managed the operations of the subsidiary. Operator liability is solely a matter of the construction and application of CERCLA, and does not require a court to apply

any other law, including the common law of corporate veil-piercing, to impose liability.

B. The Interpretation Of "Operator" Urged By Amici States Is Supported By The Policies And Purposes Of CERCLA.

Construing the term "operator" to include those who actually manage or control the affairs of the entity whose facility is the source of a release, and imposing cleanup cost liability on a parent corporation whose actions meet this test, is further supported by the statutory design and purposes of CERCLA. This Court has recognized that consideration of statutory policies and purposes is appropriate when determining the proper scope of a statute. *Rose v. Lundy*, 455 U.S. 509, 517 (1982) (construing federal statute requiring dismissal of certain habeas corpus writs by federal district courts). In this case, where the interpretation urged by Amici States is solidly grounded in the text and structure of CERCLA, additional consideration of the underlying policies of CERCLA is appropriate to further confirm the correctness of this interpretation.

This Court has recognized that "CERCLA both provides a mechanism for cleaning up hazardous-waste sites . . . and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citing 42 U.S.C. §§ 9604, 9606; holding that CERCLA abrogated states' 11th Amendment immunity), overruled by *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114 (1996). Since the earliest cases involving judicial construction of CERCLA, federal

courts have cited two specific purposes of the statute – to foster prompt and effective cleanup and to impose cleanup costs on those responsible for the release – as a basis for expansive construction of the statute, including its liability provisions. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982)). Similarly, the Second Circuit, in imposing corporate parent liability under CERCLA as urged by Amici States in this case, cited in support of its holding the congressional purpose of CERCLA to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996) (quoting S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980)). *See also, John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); and *B.F. Goodrich Co. v. Murtha*, 958 F.2d at 1198 ("Congress envisioned that EPA's costs would be recouped, the Superfund preserved, and the taxpayers not required to shoulder the burden of a nation-wide cleanup.").

A broad interpretation of "operator" liability under CERCLA, which holds a parent corporation liable for its own acts as an operator, clearly advances CERCLA's statutory purpose of placing the burden of cleanup costs on those connected to the release rather than publicly-funded cleanup programs supported by state or federal taxpayers. Given the solid support for this interpretation of operator liability in the text and structure of CERCLA, its effect in advancing the key policies of the statute

further confirms and strengthens the correctness of the interpretation.

C. The Remedial Purpose Of CERCLA Gives Further Support To An Expansive Interpretation Of CERCLA's Liability Provisions.

The interpretation of CERCLA urged by Amici States finds further support in the clearly remedial nature and purpose of CERCLA. CERCLA has frequently been cited by federal courts as a remedial statute which should be broadly construed. Several of the courts of appeals which have adopted the rule of corporate parent liability urged by Amici States have cited the remedial nature of CERCLA in support of their construction of the statute. *Kayser-Roth*, 910 F.2d at 26 ("Because CERCLA is a remedial statute, we . . . construe its provisions liberally to avoid frustration of the beneficial legislative purpose." (citation omitted)); *Schiavone*, 79 F.3d at 253 ("An interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and purpose of the legislation."); *see also, Dedham Water Co.*, 805 F.2d at 1081 ("CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment."). Indeed, the courts that have construed CERCLA have consistently acknowledged the remedial nature of the statute, and have done so more frequently in CERCLA cases than in cases involving other environmental statutes. *See*, Blake A. Watson, *Liberal Construction of CERCLA under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 262 nn.269-70 (1996) (The

author answers the question posed in the title by concluding that it is appropriate for courts to aggressively interpret CERCLA to effectuate its remedial goals.).

Amici States believe that CERCLA should be construed expansively as a remedial statute for two reasons. First, CERCLA focuses on the abatement of long-standing environmental and public health threats posed by historical releases of hazardous substances. Second, CERCLA embodies a unique liability approach which builds upon pre-existing common law legal remedies, such as nuisance and other strict liability principles, to create powerful new remedies that place the burden of cleanup on responsible persons. *See* Report of the Committee on Environment and Public Works on S. 1480, S. Rep. No. 848, 96th Cong., 2d Sess. 12-15 (1980). Thus, CERCLA is an eminently appropriate statute for application of the well-recognized canon of statutory construction that remedial statutes should be given a broad or expansive construction to further their remedial purposes. *See, Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (construing the Security and Exchange Act of 1932, and recognizing the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.") *See also, Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976).

The application of the remedial purpose canon in construing the term "operator" and determining the scope of operator liability under CERCLA reinforces and confirms the correctness of the parent liability rule urged by Amici States, which is already firmly supported by the text and structure of the statute, and serves to advance CERCLA's underlying statutory purposes.

D. The Court Should Adopt The Parent Corporation Liability Rule Under CERCLA Adopted By The Majority Of The Courts Of Appeals Deciding This Issue.

Of the seven courts of appeal that have considered this specific issue, four have interpreted CERCLA to impose operator liability on parent corporations that actively participate in management or exercise actual control of their subsidiaries. *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993). One has imposed operator liability on a parent corporation based on authority to control, rather than actual control, of the subsidiary's operations. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992). Only one court of appeals other than the Sixth Circuit has held that a parent corporation is not liable under CERCLA for a release from a subsidiary's facility unless the corporate veil can be pierced under common law principles. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990). The *Joslyn* case, however, is distinguishable from the Sixth Circuit decision here because, in *Joslyn*, there was little, if any, evidence that the parent corporation had actually participated by its own acts in managing the operations of the subsidiary. Instead, the question centered on the parent corporation's derivative liability for acts of its subsidiary, based on the parent's financial and administrative control rather than operational control of the subsidiary. That is not the issue in this case, where the question is whether a parent corporation can be held directly liable as an operator

under CERCLA because of its own acts involving management and operational control of its subsidiary.

The Amici States urge the Court to adopt the rule followed by the majority of the courts of appeals that have decided the question, by holding that a parent corporation is liable as an operator under CERCLA when the parent corporation actually controls or actively participates in the management of its subsidiary. The specifics of what constitute actual control or active participation in management is generally a "fact-intensive inquiry" and should be left for the district courts to decide on the facts of each case.

CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL., RESPONDENTS

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR ATLANTIC RICHFIELD COMPANY AND NEWMONT MINING CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENTS

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Legislative History

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In The Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-454

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL., RESPONDENTS

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR ATLANTIC RICHFIELD COMPANY AND NEWMONT MINING CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICI CURIAE[1]

Atlantic Richfield Company ("ARCO") and Newmont Mining Corporation ("Newmont") are defendants in litigation brought under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*

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[1] Pursuant to Rule 34.6, amici state: (i) that no counsel for any party authored this brief in whole or in part; and (ii) that no persons or entities other than amici made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(2)(a), letters from counsel for all parties consenting to the filing of this brief have been filed with the Clerk of the Court.

("CERCLA"). The case is *Pinal Creek Group, et al. v. Newmont Mining Corp., et al.*, No. CIV-91-1764-PHX-ROS (D. Ariz.) (the "*Pinal Creek*" case).[2] The plaintiffs in the case are not the United States or any state, but rather are current and former owners of copper mines in Arizona. These plaintiffs assert that their own former shareholders, ARCO and Newmont, should be held liable under CERCLA as "operators" based on their alleged control of the plaintiffs.

The Court's decision here probably will set the standard by which the operator issue in *Pinal Creek* will be resolved. Consequently, ARCO and Newmont have a critical interest in the outcome of this case.

THE *PINAL CREEK* LITIGATION

The *Pinal Creek* litigation arises from copper mining in the Pinal Creek Drainage Basin (the "Site") in eastern Arizona. Mining operations at the Site have resulted in groundwater pollution that must be cleaned up.

Plaintiffs in the case are Cyprus Miami Mining Corporation ("Cyprus"), BHP Copper Company, formerly known as Magma Copper Company ("Magma"), and Inspiration Consolidated Copper Company ("Inspiration"). For more than a decade, Cyprus and Magma have been mining and processing minerals at various facilities within the Site. Inspiration, Cyprus's immediate predecessor, owned and operated facilities within the Site for more than 70 years.

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[2] As of the date of this brief, a petition for certiorari in the *Pinal Creek* case was pending in this Court. *Pinal Creek Group, et al. v. Newmont Mining Corp., et al.*, No. 97-795 (petition filed Nov. 10, 1997).

ARCO's connection to the case stems from its acquisition of the Anaconda Company ("Anaconda"). From 1915 to 1978, Anaconda owned stock in Inspiration, one of the plaintiffs. While the number of outstanding shares of Inspiration stock fluctuated, Anaconda never owned more than 27.58 percent of Inspiration. ARCO is alleged to be the successor of Anaconda as the owner of this minority interest in Inspiration.

Newmont's connection to the case is that it is the former parent company of one of the plaintiffs. In 1983, a Newmont subsidiary, Pinto Valley Copper Company, acquired mining properties within the Site. In 1986, Pinto Valley was merged into Magma, another Newmont subsidiary. The combined company continued to own the mining properties as a Newmont subsidiary until 1987, when Magma was spun off as an independent company.

Faced with certain liability under CERCLA, plaintiffs began incurring costs to investigate contamination at the Site. In 1991, they brought the *Pinal Creek* case against ARCO, Newmont, and others, seeking to recover these costs from their former shareholders. Neither ARCO nor Newmont themselves ever owned or operated any mines at the Site. Instead, they are alleged to be liable because, as a former minority shareholder of one plaintiff (in the case of ARCO) and as a former parent of another plaintiff (in the case of Newmont), they allegedly "controlled" these two plaintiffs.

Based on the longstanding rule that a corporation cannot pierce its own veil, ARCO filed a motion to dismiss Inspiration's CERCLA claim. *See Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1414 (D. Ariz. 1996), *rev'd on other grounds*, 118 F.2d 1298 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3364 (U.S. Nov. 10, 1997) (No. 97-795). The district court refused to dismiss the claim, however, reasoning that ARCO can be held "directly" liable as

an operator because of Anaconda's involvement in the affairs of Inspiration. *Id.* The Court brushed aside the common law principle raised by ARCO with nothing more than the comment that CERCLA's provision for "owner or operator" liability "may occasionally conflict with state corporate law" but that this conflict is simply "unavoidable under the broad liability provisions of CERCLA." *Id.* at 1415. As a result, plaintiffs are proceeding on their claims against ARCO and Newmont based on the "control" theory.

SUMMARY OF ARGUMENT

As illustrated by the *Pinal Creek* case, the argument raised here by the United States is being used in litigation among private parties in unprecedented and pernicious ways. In *Pinal Creek*, the "control" theory is not being used by a government to reimburse its environmental response fund. Instead, the theory is being used by highly profitable mining companies in an attempt to shift all or part of their environmental response costs to certain of their former shareholders. The question is not whether the Site will be cleaned up, but rather which corporation(s) should pay.

Amici submit that the *en banc* decision of the Sixth Circuit was correct. Both the legislative history of CERCLA and the specific language of the statutory sections at issue here show that merely by using the word "operator," Congress did not intend to overrule more than a century of common law establishing that, absent a showing of the recognized grounds for piercing the corporate veil, shareholders are not liable for the actions of a corporation.

The brief of the United States – and the decision of the district court with which it agrees – rely on sweeping and unsupported statements about what is "normal" and "typical" in the relationship between a parent and a subsidiary. The

United States asserts without support in the record or in the law that CPC International, Inc. ("CPC") went beyond some undefined threshold of what the United States deems to be an appropriate level of involvement by a parent in the affairs of its subsidiary. Similar allegations have been made about amici in the *Pinal Creek* case as a purported justification for holding them liable for the acts of corporations in which they owned stock.

In this brief, amici address the misconceptions of the United States about the normal involvement of a parent or controlling shareholder in the affairs of a subsidiary. So long as corporate formalities are observed and the corporate form is not used to perpetrate a fraud, it is entirely appropriate for a parent or substantial shareholder to be closely involved in a corporation's affairs. The unwritten assumption underlying the arguments of the United States – that control is somehow wrongful or that it should lead to liability of the shareholder – is a startling departure from well-settled law. Amici therefore support the decision of the Sixth Circuit and oppose the United States' effort to punch a hole through the previously sturdy wall protecting shareholders from liability for the acts of the corporation.

The United States also confuses the two distinct theories on which operator liability of a parent corporation could be premised. The United States alternates between arguing (1) that the parent should be liable for the acts of the subsidiary based on the parent's control of the subsidiary's affairs (a *derivative* theory of liability) and (2) that the parent should be liable for its own actions in directly operating a facility (a *direct* theory of liability). The Sixth Circuit recognized that these two theories are distinct. As to derivative liability, the Sixth Circuit correctly held that a parent cannot be liable for the actions of its subsidiary unless grounds exist for piercing the corporate veil under state law. As to direct liability, the Sixth Circuit

correctly stated that the parent can be liable only if it "independently" operates the facility "in the stead of its subsidiary" or "actually operate[s] the facility alongside its subsidiary." 113 F.3d at 579.

ARGUMENT—

I. INTRODUCTION.

Under CERCLA, a past or present "owner or operator" of a hazardous waste facility is liable for cleanup costs paid by the government. 42 U.S.C. § 9607(a). The question presented by this case is whether a parent corporation becomes an "operator" under CERCLA by participating in and exerting some degree of control over the affairs of a subsidiary that owns such a facility. Pet. Br. at I. The answer hinges, in large measure, on whether Congress meant to sweep away traditional common law principles of limited shareholder liability merely by using the word "operator" in CERCLA.

ARCO and Newmont urge the Court to affirm the decision of the Sixth Circuit. The court's interpretation of CERCLA is sound, and it appropriately refused to nullify time-honored principles of common law without more indication that Congress intended to do so when it enacted CERCLA. *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 579 (6th Cir. 1997) (en banc). The Sixth Circuit also refused to impose an amorphous standard of corporate shareholder liability because of the dangers inherent in such an approach. *Id.* at 580. Not the least of these concerns is the substitution of "the relatively bright line provided by the traditional doctrine of piercing the corporate veil with a nebulous 'control' test." *Id.*

The *Pinal Creek* case aptly demonstrates the dangers inherent in this slippery-slope approach. There, the plaintiffs

are private mining corporations that own and operate (and generate huge profits from) copper mines that produce hazardous wastes. Having admitted liability under CERCLA, these corporations are using a "control" theory to sue *their own former shareholders* for the cleanup costs at the site. Such a lawsuit would be forbidden by the common law, but it is precisely the type of litigation being generated by the "control" standard.

II. THE SIXTH CIRCUIT'S DECISION IS SOUND.

A. CERCLA Is Presumed Not To Nullify Well-Established Common Law Rules.

The starting point in this case, "'like the starting point in any case involving the meaning of a statute, is the language of the statute itself.'" *United States v. Fabe*, 508 U.S. 491, 500 (1993) (quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979)). When reviewing the text of a federal statute, a court must keep in mind that "Congress does not write upon a clean slate." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). Rather, "Congress acts against the background of the total *corpus juris* of the states." *Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997) (ellipsis omitted) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Because the common law exists as a backdrop to all congressional acts, and because Congress has limited constitutional powers, this Court presumes that a federal statute retains "'long-established and familiar principles'" of the common law. *United States v. Texas*, 507 U.S. at 534 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). This Court will not read an act of Congress as overcoming this presumption and abrogating the common law, unless the act "speak[s] directly" to the common-law principle and

congressional intent to override it is "evident." *Id.* (citations omitted).

Here, there is no evidence of any congressional intent to override the common law. On the contrary, the Senate sponsor of the bill stated: "It is intended that issues of liability not resolved by this act, if any, *shall be governed by traditional and evolving principles of common law.*" 126 Cong. Rec. S14964 (Dec. 3, 1980) (Statement of Sen. Randolph) (emphasis added). The legislative history of CERCLA is replete with references to adopting and following common law principles.[3]

The principle at issue here is a basic tenet of the common law. Limited liability of corporate shareholders is the "keystone" of American corporation law. Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVT'L AFF. L. REV. 579, 622-23 & n.156 (1993) (collecting authorities). To encourage business in the corporate form, every state has passed laws under which the

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[3] *E.g.*, 126 Cong. Rec. S15006 (Nov. 24, 1980) ("Under the bill, no obligations or liabilities of any person under other Federal or State law, including common law, are diminished by the provisions of this bill.") (Statement of Sen. Randolph, sponsor of the bill); 126 Cong. Rec. S16427 (Dec. 12, 1980) ("I want to make it clear that section 302 of H.R. 7020 [the CERCLA bill passed by the House] provides that nothing in the act affects or modifies in any way rights or liabilities under other State or Federal law, including common law.) (Statement of Sen. Randolph); S. Rep. No. 96-848, at 31 (1980) ("[CERCLA's] liability scheme essentially codifies the common law liability standard applicable in cases involving hazardous substances and materials."); Hearing on H.R. 85 and H.R. 7020 Before the House Comm. on Ways and Means, 96th Cong. (June 2, 1980) ("Well, in 7020, what we are doing, is clearly making the statutory law the same as the common law in certain states.") (Statement of Rep. Florio, sponsor of the bill).

"shareholders of the corporation, including, if there is one, its parent corporation, are not responsible" for injuries caused by the corporation. *Radaszewski v. Telecom Corp.*, 981 F.2d 305, 306 (8th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993). Thus, "[a] corporation and its stockholders are generally to be treated as separate entities. Only under exceptional circumstances . . . can the difference be disregarded." *Burnet v. Clark*, 287 U.S. 410, 415 (1932).[4]

With these principles in mind, the Sixth Circuit carefully reviewed CERCLA's language and legislative history. Initially, the court found what many other courts have recognized: that many of its provisions are vague, its legislative history is sparse, and its "specific" as opposed to "general" goals are difficult to discern because the statute represents an eleventh-hour compromise. *Cordova*, 113 F.3d at 578. This point cannot be reasonably disputed; even courts that have eschewed the common law in this context readily acknowledge that CERCLA is "notorious for its lack of clarity and poor draftsmanship." *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993). Upon reviewing the liability provisions in CERCLA, the Sixth Circuit found nothing in the statute that "warrants the invocation by courts of vague, expansive concepts . . . which threaten the efficacy of time-honored limited liability protections afforded by the corporate form." *Cordova*, 113 F.3d at 579. The Sixth

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[4] Piercing the corporate veil is difficult to accomplish and generally requires a showing that the corporation was the mere alter ego of the shareholder, that the shareholder disregarded the corporate form, *and* that the corporate form was used to perpetrate a fraud or injustice. *See, e.g.*, *Morris v. New York State Dept. of Tax. & Fin.*, 623 N.E.2d 1157, 1160-61 (N.Y. 1993); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 267 (D. Del. 1989) (Delaware law); *Norman v. Del Elia*, 533 P.2d 537, 539 (Ariz. 1975).

Circuit accordingly held that a parent corporation is liable under CERCLA, based upon the extent of its control and involvement in an offending subsidiary, "only when the requirements necessary to pierce the corporate veil are met." *Id.* at 580.

Unless there is sufficient evidence in CERCLA demonstrating that Congress did, in fact, intend to disrupt this fundamental principle of common law, the Sixth Circuit's decision must stand. *See United States v. Texas*, 507 U.S. at 534; *Astoria*, 501 U.S. at 108. Not only is such evidence lacking, the legislative history reveals the clear intent of Congress to preserve and incorporate common law principles. *See supra* n.3 & accompanying text. Moreover, as explained in the next point, the language and structure of CERCLA show that Congress intended to preserve longstanding protections afforded to shareholders that exert control over the activities of a corporation that owns or operates a hazardous waste disposal facility.

B. Applying The Principle "Expressio Unius Est Exclusio Alterius," The Text Of CERCLA Shows That Congress Did Not Intend To Abrogate The Common Law Rule of Limited Shareholder Liability.

The United States contends that the answer to the question presented by this case lies strictly within the text of CERCLA – without reference to the common law. The United States' argument goes as follows. CERCLA defines a corporation as a "person," 42 U.S.C. § 9601(21), and then imposes liability on any person that "owns or operates" a facility. 42 U.S.C. § 9607(a); *see* Pet. Br. at 18-19. CERCLA then defines the phrase "owner or operator" circularly, as any person "owning or operating [a] facility." 42 U.S.C. § 9601(20)(A)(ii). From this, the United States argues that liability attaches to any

person – including the shareholders of a corporation – if their activities fall within one of several broad dictionary definitions of the term "operator." Pet. Br. at 20-22. According to the United States, moreover, creating an extremely broad liability net by defining the term expansively is permissible as it furthers the statute's goal of promoting cleanup of hazardous waste disposal sites. *Id.* at 26.

By relying on this expansive definition of the term "operator," the United States ascribes to one word "a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth'" to CERCLA. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). It is not surprising that CERCLA, like many other federal statutes, includes corporations as potentially liable "persons" under the act. As such, CERCLA establishes with relative clarity that a corporation that actually owns or directly operates a hazardous waste disposal facility can be held liable under the act. 42 U.S.C. §§ 9601(20)(A) & 9607(a). But this conclusion merely begs the question presented here: when shareholders choose to conduct business using the corporate form, and that corporation owns or operates a hazardous waste disposal facility, does CERCLA impose liability not only on the corporation, but also on *the shareholders* of the corporation if they exercise some degree of "control" over and "actively participate" in the affairs of the corporation? By using the single word "operator," did Congress intend to nullify the time-honored protections that the common law otherwise affords corporate shareholders, merely because the corporation owns or operates a hazardous waste disposal facility? On this question, the text of CERCLA provides a very different answer than that posited by the United States.

Congress did not employ the same definition in CERCLA for all owners or operators of facilities. Rather, § 9601(20)(A) defines the phrase "owner or operator" as follows:

> (i) in the case of a vessel, any person owning, operating, or chartering by demise such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, *or otherwise controlled activities at* such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A)(i)-(iii) (emphasis added). Subsection (iii) defines an "owner or operator" of a facility conveyed to a state or local government by means of foreclosure or otherwise to include not only those who actually "owned" or "operated" a facility, but also any person who "otherwise controlled activities at such facility." But subsection (ii) defines an "owner or operator" of all other facilities as *only* those persons "owning or operating" the facility. As such, Congress expressly made *both* "owners or operators" *and* those who "otherwise controlled activities" liable with respect to government-owned facilities. Congress excluded any such "control" group, however, from its definition of those who are liable as operators of other facilities, such as the facility at issue here.

This distinction cannot be ignored without violating the cardinal principle of statutory construction, "*expressio unius est*

exclusio alterius" – the inclusion of one is the exclusion of another. In other words, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). That Congress made both actual owners or operators and those who "otherwise controlled activities" liable only for state-owned facilities "underscores [the courts'] duty to refrain from reading [that] phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). The Fifth Circuit aptly summarized the point as follows:

> Significantly, CERCLA does not define "owners" or "operators" as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law.
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> . . . .
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> . . . . Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations. In fact, Congress adopted a "control" test in the next subsection of the statute. Under CERCLA, the term "owner or operator" is defined for facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment, as "any person who owned, operated *or otherwise controlled* activities at such facility immediately" before conveyance. No such "control" test appears in subsection (ii), the subsection at issue in this case, and we will imply none.

Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82-83 (5th Cir. 1990) (emphasis in original), *cert. denied*, 498 U.S. 1108 (1991). *Accord Cordova*, 113 F.3d at 579.

Those courts that have eschewed traditional common law principles in favor of a control test simply have failed to square their analysis with the "otherwise controlled activities" language found in subsection (iii) but not in subsection (ii). *E.g.*, *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221-22 & n.11 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1109-10 (11th Cir. 1993); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991). Indeed, when discussing the text of CERCLA, the First Circuit in *Kayser-Roth* deleted from its analysis any reference to subsection (iii). 910 F.2d at 27 n.7.

These courts have reasoned that in their view the text of CERCLA "provide[s] no reason why a parent corporation cannot be held liable as an operator under CERCLA." *Id.* at 26. This analysis has the rule backwards. Traditional common law rules apply *unless* Congress has spoken directly to the issue and congressional intent to nullify it is evident, not the other way around. *United States v. Texas*, 507 U.S. 529, 534 (1993); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

The United States touches briefly on this subject in its brief, but its analysis is unpersuasive. The United States initially reviews the amendments Congress has made to the definition of "owner or operator" in section 9601(20)(A)(iii), Pet. Br. at 26-28, but fails to mention that Congress has *always* imposed liability on those who "otherwise controlled activities" in subsection (iii), and has *never* imposed liability on this group for facilities that fall within the scope subsection (ii). This fact actually reinforces the conclusion that Congress has

purposefully excluded a "control" group from those liable for facilities covered by subsection (ii). In the end, the United States is forced to argue that Congress placed the "otherwise controlled activities" language in subsection (iii) merely "to make clear that the term 'owner or operator' includes persons who 'controlled activities' at an inactive facility." Pet. Br. at 28.

That cannot be the correct interpretation of this provision. The United States' proposed definition of "operator" clearly is broad enough to cover both persons who actually operate a facility as well as persons who "otherwise controlled activities at such a facility." Pet. Br. at 20-21. To construe the term "operator" in this manner renders the language "or otherwise controlled activities" in subsection (iii) entirely superfluous. The United States' interpretation also ignores the distinction Congress made in its definition of "owner or operator" in subsections 9601(20)(A)(ii) and (iii). Courts do not "construe one provision in a statute so as to suspend or supersede another provision. To avoid denying effect to a part of a statute, [courts should] accord 'significance and effect . . . to every word.'" *Rake v. Wade*, 508 U.S. 464, 471-72 (1993) (quoting *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879)). *Accord United States v. Fabe*, 508 U.S. 491, 504 n.6 (1993); *Moskal v. United States*, 498 U.S. 103, 109-10 (1990).

In sum, no principle of law is more fundamental than that of limited liability of corporate shareholders. If Congress intended to abrogate this rule in CERCLA's definition of "owner or operator," it surely would have done so with more clarity than one can discern in the statute. In fact, the text, structure, and legislative history of CERCLA evince a clear congressional intent to leave this common law rule intact with respect to facilities other than those conveyed to a state or local government by foreclosure or similar means.

III. THE UNITED STATES RELIES ON UNSUPPORTED AND ERRONEOUS ASSERTIONS ABOUT THE "TYPICAL" RELATIONSHIP BETWEEN A PARENT AND ITS SUBSIDIARY.

Both the United States and the district court rely upon unsupported – and wholly erroneous – assertions about the "typical" degree of control exercised over a corporation by its parent or controlling shareholder. Inherent in this reasoning is the assumption that a parent's normal "control" of its subsidiary is somehow wrongful and justifies a court in stretching a statute to impose liability on the entity exercising such control.

On the contrary, so long as the corporate formalities are observed, and the corporate form is not used to perpetrate a fraud, it is normal and proper for a parent or controlling shareholder to oversee its investment through careful supervision of the subsidiary's affairs. In so doing, the shareholder depends on the traditional rule of limited liability. As this Court has observed: "Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). Indeed, "one of the primary purposes of the corporate form of business is to insulate shareholders from unlimited liability . . . ." *C M Corp. v. Oberer Dev. Co.*, 631 F.2d 536, 541 (7th Cir. 1980).

The United States argues that a parent corporation normally restricts itself to exercising "*general authority* over a wholly-owned subsidiary" and that a parent should decide only a subsidiary's "*general matters* of corporate governance put forward by the board." Pet. Br. at 43 (emphasis added). The United States then asserts that it is not "usual" or "typical" for a parent to go beyond such "general" supervision by placing its

own employees in executive positions at a subsidiary and that doing so should subject the parent to CERCLA liability:

> Thus, in the *usual* situation, the subsidiary's own executive officers, acting on behalf of the subsidiary, are responsible for managing the subsidiary and "operating" the subsidiary's facility. If the parent corporation, however, *departs from the typical practice* and employs its own agents as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, "operating" the subsidiary's facility.

Pet. Br. at 44 (emphasis added). The district court employed a similar distinction.[5]

The United States cites neither support in the record nor precedent in the law for the notion that it is "typical" for a parent or controlling shareholder to refrain from direct involvement in the affairs of a subsidiary. In fact, the law is decidedly to the contrary. Numerous courts have recognized that parent companies necessarily control all important decision-making by their subsidiaries, and that such control does not lead to liability of the parent. *E.g.*, *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) ("Common management and ownership are ordinary aspects of a parent-

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[5] The district court held: "A parent's actual participation in and control over a subsidiary's functions and decision-making creates 'operator' liability under CERCLA; a parent's mere oversight of a subsidiary's business *in a manner appropriate and consistent with the investment relationship* between a parent and its wholly owned subsidiary does not." 777 F. Supp. at 573 (emphasis added).

subsidiary relationship."); *American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996) ("The circumstances relied upon to establish GBL's 'domination' over Keystone reflect no more than a normal parent-subsidiary relationship."); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459-60 (2d Cir. 1995) (parent's control over subsidiary's leases, major capital expenditures, and other business affairs held to be "typical of a majority shareholder or parent corporation"); *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1287 (5th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989) (operating a subsidiary "in close concert with the interests of the owners" is "perfectly natural and proper and provides no basis for ignoring legal independence"); *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 150 (3d Cir. 1988) ("It is assumed to be the norm that a parent will have 'not only . . . the potential to exercise control [over the subsidiary], but to exercise it to a substantial degree.") (quoting P. Blumberg, The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations § 10.02, at 187 (1987) (alterations in original)); *Topp v. CompAir Inc.*, 814 F.2d 830, 837 (1st Cir. 1987) ("[T]he fact that a parent corporation exercises the control which is necessarily incident to the full ownership of its subsidiary is insufficient, without more, to justify ignoring the separate corporate entities."); *Edwards Co. v. Monogram Indus., Inc.*, 730 F.2d 977, 986 (5th Cir. 1984) (en banc) ("Undoubtedly, Monotronics was ultimately controlled by Monogram. This will always be the case where a parent corporation has a wholly-owned subsidiary.").

The district court did not purport to find grounds sufficient to pierce the corporate veil between CPC and its subsidiary. Instead, the district court concluded that CERCLA authorized the creation of "a new, middle ground" on which a parent corporation could be found liable as an "operator" based on an ill-defined set of "factors." 777 F. Supp. at 573. These

"factors," as identified by the district court, consist of: "the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal." *Id.*[6] As the Sixth Circuit correctly pointed out, however, "these activities are not grounds traditionally relied upon as warranting the disregard of separate corporate existences." 113 F.3d at 580.

Parent corporations routinely participate in and direct those phases of a subsidiary's business identified by the district court, and it has never been thought improper for parents to do so. For example, as to the district court's first factor (participation in the subsidiary's board of directors), even the United States recognizes that "stock ownership . . . allows the parent to choose the subsidiary's board of directors and to vote on general matters of corporate governance put forward by the board." Pet. Br. at 43. The other "factors" relied on by the district court have come up frequently in the lower courts in contexts other than CERCLA and have not been found to be grounds for disregarding a subsidiary's corporate form.[7]

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[6] The district court's only other suggested guidelines were that "determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful . . . ." Other evidence, the court observed, "may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator . . . ." 777 F. Supp. at 573.

[7] *See, e.g., American Tel. & Tel. Co.*, 94 F.3d at 589 n.4, 591 (corporate form cannot be disregarded to exercise jurisdiction over parent, even where parent had participated in detailed management decisions such as spending money on anti-pollution equipment, subsidiary was included in parent's consolidated tax returns, and an employee of the parent attended all meetings of the subsidiary's board of directors); *Edwards Co.*, 730 F.2d at 979 (no

(continued...)

Moreover, because CERCLA imposes liability on both current and past operators of hazardous-waste facilities (see 42 U.S.C. § 9607(a)(1), (2)), the test advocated by the United States would encourage current operators of facilities to sue *their own former shareholders*, based on their alleged "control" over the offending corporation. This tactic may seem absurd because "the accepted rule is that the corporate veil will only be pierced to protect the interests of third parties; the separate corporate entity will not be disregarded to allow the corporation to escape its obligations." *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739, 751 (7th Cir. 1989).[8] Nonetheless, this is precisely the

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[7] (...continued)
liability of parent even though all officers and directors of subsidiary were either officers or directors of parent, subsidiary did not have its own payroll or office space, and all bookkeeping was handled by parent); *Williams v. McAllister Bros. Inc.*, 534 F.2d 19, 21-22 (2d Cir. 1976) (no liability of parent even though key officers and directors of subsidiary were all employees of the parent, and the parent required that it be informed of and consent to major repairs to the subsidiary's tugboats); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1128, 1134-35 (N.D. Ala. 1993) (no liability of corporate parents despite "their providing technology, research, testing, personnel, and facilities to Dow Corning; their control and election of Dow Corning's board of directors; [and] their management of Dow Corning's financial affairs;" and observing that "the sharing of directors is a practice frequently found in parent and subsidiary relationships"); *Akzona Inc. v. E.I. du Pont de Nemours & Co.*, 607 F. Supp. 227, 237-40 (D. Del. 1984) (corporate form cannot be disregarded to exercise jurisdiction over parent, even where parent was 100% owner of subsidiary, there were common directors, and parent required that it approve significant expenditures).

[8] *Accord McCarthy v. Azure*, 22 F.3d 351, 362-63 (1st Cir. 1994) ("the [alter-ego] doctrine can be invoked 'only where equity (continued...)

theory that the plaintiffs are pursuing in the *Pinal Creek* litigation. Despite the common law rule against a corporation suing its own shareholders, plaintiffs' theory that CERCLA's use of the word "operator" authorizes just such a claim so far has survived a motion to dismiss.

The Court should stop this derogation of longstanding common law protections afforded to corporate shareholders and hold, as the Fifth and Sixth Circuits have held, that "[i]f Congress wanted to extend [CERCLA] liability to parent corporations" – and if it wanted to allow corporations to pierce their own veils and impose CERCLA liability on their own shareholders – "it could have done so, and it remains free to do so." *Cordova*, 113 F.3d at 579-80 (quoting *Joslyn Mfg.*, 893 F.2d at 83). But Congress has not done so, and neither should the federal courts. "[A]ny bold rewriting of corporation law in this area is best left to Congress." *Joslyn Mfg.*, 893 F.2d at 83.

IV. THE UNITED STATES CONFUSES DIRECT AND DERIVATIVE LIABILITY, AND USES EVIDENCE OF ONE TO SUPPORT THE OTHER

Throughout its brief, the United States intertwines and confuses two concepts that are central to this case: a parent's *derivative* liability (if any) for the actions of its subsidiary and a parent's *direct* liability for its own actions. When the facility is owned and operated by the subsidiary, and the parent is alleged to be liable simply because it participated in and

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[8] (...continued)
requires the action to assist a third party'"); 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.10, at 615, 634 n.13 (perm. ed. rev. vol. 1990) (the corporate form may be disregarded only where equity requires doing so to assist a third party).

controlled the business affairs of the subsidiary, any liability of the parent is completely derivative. For example, the United States poses the question presented strictly in terms of derivative liability: "Whether a corporation that . . . exercised control over . . . the operations of a subsidiary may be held liable . . . as an operator of the subsidiary's facility." Pet. Br. at I.

At times, however, the United States drops its derivative theory and argues instead for direct liability: "CERCLA subjects entities to *direct liability*, without regard to corporate form, based on the entity's *own* actions in operating the facility." Pet. Br. at 17 (emphasis in original). *See also* Pet. Br. at 34. The United States switches back and forth between the two theories and finally settles on a hybrid: "When a parent corporation . . . actually participates in the day-to-day operation *of a subsidiary and its facility*, CERCLA dictates that the corporation should be responsible . . . for the costs of cleanup." Pet. Br. at 41 (emphasis added).

Amici suggest that the two concepts are distinct and should be analyzed differently. If a parent corporation is alleged to be liable because of claimed control over the subsidiary's business affairs and decision-making, the theory is derivative. ARCO and Newmont support the analysis of the Sixth Circuit and the position of CPC that under CERCLA, a parent is derivatively liable for its subsidiary's operation of a facility only when there exist grounds for piercing the corporate veil under state law. *See Cordova*, 113 F.3d at 580. If a parent corporation is alleged to be liable because of *its own* conduct, the theory is direct liability. The Sixth Circuit observed that direct liability conceivably might be found where a parent "independently operates the facility in the stead of its subsidiary." *Id.* at 579. The task facing the court under such a theory is to determine whether the evidence shows independent

operation of the facility by the parent itself – not by the subsidiary.

The district court did not purport to find grounds for piercing the corporate veil between CPC and its subsidiary, and consequently there is no basis for imposing derivative liability on CPC. As we show in the next point, the United States also has failed to identify evidence that would support a conclusion that CPC should be directly liable for operating the facility itself.

A. The United States Does Not Identify Sufficient Evidence Of Actual Operation Of The Facility By CPC To Prove Direct Liability.

Despite the efforts of the United States to marshal the evidence (Pet. Br. at 45-47), it is apparent that the record falls well short of demonstrating that CPC itself actually operated the facility. According to the United States, CPC "placed its own high level officers in key management positions of its subsidiary" and "made loans to its subsidiary . . . and assumed several of the subsidiary's loans." Pet. Br. at 45, 47. But these facts pertain solely to the parent's general oversight of the subsidiary's business and are relevant, if at all, only to a theory of derivative liability.

When it comes to actual involvement at the facility, petitioner cites only two items. *First*, the United States points to decisions made by individuals who were officers of both the subsidiary and CPC. Pet. Br. at 45-46. Just like the plaintiffs in *Pinal* Creek, the United States automatically attributes to the parent the actions of any person who was an officer of both the subsidiary and the parent. In so doing, the United States effectively ignores the corporate existence of the subsidiary – its argument assumes that the subsidiary's corporate veil is to be pierced, merely because employees of the subsidiary also

hold positions with the parent. But the existence of such dual employees is insufficient under state law to pierce the veil. See *Edwards Co.*, 730 F.2d at 979, and other cases cited at *supra* n.7. Thus, the United States' argument again depends on disregarding fundamental principles of common law. However, in enacting CERCLA Congress demonstrated no intent to alter basic principles of state corporation law, but instead evinced a clear intent to adopt and incorporate state common law principles. *See supra* n.3. Thus, when the subsidiary is the owner of a facility, and its employees make day-to-day decisions about operations at the facility, the parent cannot be saddled with liability as an operator merely by ignoring the separate existence of the subsidiary and attributing to the parent all actions of dual employees.[9]

Second, the United States points to involvement in environmental issues of CPC's environmental affairs director, G.R.D. Williams. Even accepting the best case that the United States can make for Williams' involvement, it appears that he was involved only in particular decisions from time to time. There is no claim that he exercised either day-to-day operational control at the facility or that he set and enforced long-term policy for operations at the facility.

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[9] Dual officers and directors are "very common in the realm of business." *Western Pac. R.R. Corp. v. Western Pac. R. Co.*, 197 F.2d 994, 1000 (9th Cir. 1951), *cert. denied*, 346 U.S. 910 (1953). Persons who hold such dual positions are not liable to either corporation as a result of such duality unless they "favor the interests of one corporation while sacrificing or betraying those of the other." *Id.* Thus, state common law recognizes no reason why dual officers and directors cannot faithfully discharge their fiduciary duties *to the subsidiary*, while retaining positions with the parent. Absent a breach of fiduciary duty, a dual employee's actions on behalf of the subsidiary must be attributed solely to the subsidiary.

B. Direct Liability Of A Parent Must Be Based On A Showing That The Parent Independently Operated The Facility.

Amici submit that the evidence cited by the United States is insufficient to show that CPC – and not its subsidiary – independently operated the facility. As shown in this brief, parent corporations typically are closely involved in the operations of their subsidiaries. As shown above (*supra* n.3), it is common for a single individual to hold a position with both companies. Because parent corporations are entitled to create such dual positions without losing the protection of the subsidiary's corporate shield, amici submit that acts of dual employees cannot be attributed automatically to the parent for purposes of attempting to establish the liability of a parent. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) ("[M]ere existence of common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer.").

Similarly, a parent's oversight of its investment in a subsidiary's business naturally leads many parent corporations to provide technical advice and assistance to their subsidiaries, to send employees to inspect and report on operations at a facility, or even to become involved in particular decisions at a facility. An example is Williams' involvement in particular environmental matters. Pet. Br. at 46. Amici submit that these discrete, episodic kinds of involvement at a facility are insufficient to establish that a parent actually has become the "operator" of a facility.

As the Sixth Circuit acknowledged, a parent might become liable as an operator of a facility owned by a subsidiary if the parent "independently operate[s] the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate[s] the facility alongside its subsidiary." 113 F.3d at

579. In order to meet this test, the evidence must be unequivocal that the acts relied upon truly were acts of the parent. An act of a person employed by both the parent and the subsidiary cannot be attributed to the parent unless there are grounds for piercing the corporate veil. In addition, the evidence must be sufficient for the finder of fact to conclude that the parent itself operated the facility, independently of the subsidiary, during a period of hazardous waste disposal. Evidence that employees of the parent exercised some measure of influence or control over the facility, provided services or assistance, made visits to the facility, or decided certain issues pertaining the facility are insufficient to prove that the parent was an operator of the facility.

This standard for measuring direct liability prevents imposition of operator liability merely by attributing to a parent conduct that under common law must be attributed to a subsidiary. Respect for the corporate veil and the traditional rule of limited shareholder liability demands that liability of a parent be based on either: (1) facts sufficient to justify piercing the corporate veil; or (2) facts demonstrating that the parent itself has engaged in the conduct that serves as the basis for liability. A parent is entitled to own a subsidiary that operates a facility, and to exercise "normal incidents of stock ownership, such as the right to select directors and set general policies," *Lusk*, 129 F.3d at 778, without thereby becoming liable under CERCLA as an operator of the facility.

Amici submit that both the derivative and the direct theories of liability are presented by this appeal, and that both should be addressed. If the Court were to hold only that a parent cannot be derivatively liable as an operator for the acts of its subsidiary unless there are grounds for piercing the corporate veil under state law, plaintiffs simply would switch to a theory of direct liability. Plaintiffs would assert, as they do here and in *Pinal Creek*, that acts of the subsidiary should be

attributed to the parent and that the parent should be "directly" liable for those acts.

CONCLUSION

Nothing in CERCLA'S text or legislative history suggests that Congress intended to substitute the relatively bright line test provided by the traditional doctrine of piercing the corporate veil with an amorphous control test. This Court should reject the control test because it is leading to absurd and unfair results, as demonstrated by the *Pinal Creek* litigation, where corporations are attempting to impose operator liability on their former shareholders in derogation of the common law principle that bars such actions. As the Sixth Circuit appropriately held, parent corporations are not liable as operators for the conduct of their subsidiaries unless there exist grounds under state law for piercing the corporate veil, or the parent corporation independently operates a facility. Because the United States did not meet its burden under either theory, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CPC INTERNATIONAL, INC., et al,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

Atlantic Legal Foundation ("ALF") is a not-for-profit public interest legal foundation whose mandate includes the advocacy in the courts of principles of private enterprise and the mechanism of the market economy, limited government and opposition to burdensome regulation[1].

The appearance of Atlantic Legal Foundation as *amicus curiae* in this case is desirable to provide the Court with a public policy perspective that CERCLA should not be interpreted to vitiate the common law concept of limited liability where the statute and its legislative history do not evince an intent of Congress to depart from common law principles.

Atlantic Legal Foundation argues that the terms "operated" and "owned" as used in section 107(a)(2) of Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the term "owner or operation" as used in Section 101(20)(A)(ii) are tautological and unhelpful in determining the reach of CERCLA's imposition of liability, that the legislative history of CERCLA does not support the position of Petitioner, and that in light of the long and well-established common law concept of "piercing the corporate veil" which has informed

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced, in whole or in part, by any person or entity other than *amicus curiae* or its counsel. CPC International, Inc. has for several years been a financial supporter of Atlantic Legal Foundation, but its contribution has amounted to less than 2.0 % of Atlantic Legal Foundation's annual budget. Clifford B. Storms, a member of the board of directors of Atlantic Legal Foundation, is a former senior vice-president and general counsel of CPC International, Inc.

and guided business decisions for decades, absent a clear intent of Congress to adopt a different standard, the courts should not construe CERCLA to eliminate the concept of limited liability for shareholders.

Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The principal issue in this case is whether a corporate parent should be held liable as an "owner or operator" of a facility owned by a subsidiary only if the criteria for corporate law veil piercing under state law are met, or whether there is or should be a federal common law with looser standards.

The United States argues that CERCLA liability should extend beyond the language of the statute and should be far broader than state statutory and common law rules of corporate liability for acts of subsidiaries. The position of the United States is supported neither by the language of CERCLA nor by its legislative history. Indeed, when Congress intended to give "operator" or "owner" meanings broader than their common law usage, it used specific verbal formulae not used in the section of CERCLA here at issue. The rule of interpretation ALF advocates here is the presumption that Congress does not normally intend to displace state law by mere implication.

Those courts which have formulated a "federal common law" theory of pass-through liability have engaged in law making, not law interpreting. The plain language of the statute does not support the imposition of liability on parent corporations that do not in fact control the offending

facility. Neither is there any legislative history of CERCLA to support the notion that "person owning or operating" a facility includes persons who control or have the power to control (even is such power is not exercised) a related firm that is the actual owner and operator of the facility, if that control does not extend to the operation of the facility.

Corporation law with respect to preserving the independence of subsidiaries and the circumstances under which liability will be imposed on shareholders or related companies has been a traditional area of state legislation. Absent a clear conflict between federal statutory law or policy imperative and state corporation law, the federal courts should avoid creating a federal common law of corporate governance and liability absent unusual circumstances that do not here exist.

STATEMENT OF FACTS

ALF adopts the facts as stated by the United States Court of Appeals for the Sixth Circuit en banc in its opinion in *United States v. Cordova Chemical Co.*, reported at 113 F.3d 572.

ARGUMENT

I. THE LANGUAGE AND THE LEGISLATIVE HISTORY OF CERCLA DO NOT EVINCE ANY CONGRESSIONAL INTENT TO DISPLACE STATE CORPORATION LAW PRINCIPLES

A. The Statutory Language Provides No Guidance for Interpretation

"A rose is a rose is a rose is a rose."

Gertrude Stein, *Sacred Emily* (1913)

Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), imposes liability on

> . . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . .

Section 101(20)(A) of CERCLA, 42 U.S.C. § 101(20)(A) defines "owner or operator" as follows:

> The term "owner or operator" means . . . (ii) in the case of an onshore facility[2] . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local

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[2] Such as the facility at issue in this case.

> government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

These statutory definitions are merely tautological and completely circular[3]. They provide no guidance for determining whether a shareholder or parent corporation is the "owner or operator" of a facility, title to which is held by a subsidiary and which facility is operated by the subsidiary.

If any meaning can be inferred from these definitional clauses, it is that when Congress intended to broaden exposure to liability, it chose the particular words "any person who owned, operated, or otherwise controlled activities at such facility," CERCLA §101(20)(A)(iii)(emphasis supplied) as it did in the language relating to liability of former owners in cases of bankruptcy and other involuntary transfers of ownership. That language is absent in the definition of "owner or operator."

The judiciary should not presume that Congress intended different verbal formulations in the same section of a statute to have the same meaning. *See Russello v. United States*, 464 U.S. 16, 23 (1983)

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[3] *See Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988).

B. The Legislative History of CERCLA Provides No Support for Petitioner's Position

The legislative history of CERCLA is notably sparse for a statutory scheme that has such far-reaching consequences. *See* Frank A. Grad, "A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1 (1982); *see also Wilshire Westwood Assoc. V. Atlantic Richfield Corp.*, 881 F.2d 801, 806-807 (9th Cir. 1989)(discussing CERCLA's legislative history) and we are aware of no part of the scant legislative history that sheds any light on the definitional problem; the United States has cited none. Indeed, one commentator has noted that "In 1980 a lame duck Congress hurriedly assembled and passed a bill that ultimately became law. Congress acted with very little discussion, under a suspension of the rules, with no allowance for amendments." Lois J. Schiffer[4] and Timothy J. Dowling, "Reflections on the Role of the Courts in Environmental Law," 27 ENVTL. L. 327, 333 (1997).

Other authorities have also attributed ambiguities or lacunae in CERCLA to the haste with which it was enacted. *See, e.g., United States v. Maryland Bank and Trust Co.*, 632 F.Supp. 573, 578 (D.MD.. 1986)("the structure of section 107(a) [of CERCLA], like so much of this hastily patched together compromise Act, is not a model of statutory clarity." *See also, United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H. 1985)("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and

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[4] Now Assistant Attorney General in charge of the Environmental and Natural Resources Division of the Department of Justice and one of the counsel for the United States in this case.

an indefinite, if not contradictory, legislative history.")

There is no suggestion in the legislative history that Congress intended to override state law with respect to imposing liability on shareholders, including corporate "parents," and the United States cites none.

II. STATE COMMON LAW AND STATUTORY CRITERIA FOR HOLDING PARENTS LIABLE FOR ACTS AND LIABILITIES OF SUBSIDIARIES SERVE IMPORTANT SOCIAL AND ECONOMIC POLICIES

Limited liability is a fundamental tenet of corporate law and the economic foundation for marshaling capital and applying it to economically efficient goals. *See generally* Philip I. Blumberg, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS ("Blumberg") 1.01-1.05 (1987). Limited liability means that a shareholder will be held liable for the value of its investment in a corporation; it shields shareholders from claims of creditors that exceed the equity value of the shareholder's investment. This, in turn, makes it feasible for shareholders to invest in corporations they have no ability to manage or interest in managing, thus severing, in many cases, ownership from management; it enables investors to ignore the net worth and potential extraneous liabilities of fellow investors (who generally are anonymous).

Limited liability has acquired an important status in law because it is necessary to the functioning of a mature industrial economy capable of growing and distributing wealth by investing in ventures that are "risky," not so

much because of dangers to the environment or the health and safety of third parties, but from a perspective of financial analysis. *See* Blumberg at 4.02; William O. Douglas and Carol M. Shanks, "Insulation from Liability through Subsidiary Corporations," 39 YALE L. J. 193 (1929); Frank H. Easterbrook and Daniel R. Fischel, "Limited Liability and the Corporation," 52 U. CHI. L. REV. 89, 92, 97 (1985).[5]

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[5] Some commentators have asserted that corporations that are shareholders, and especially parent corporations that control wholly owned subsidiaries do not need the protection of limited liability because they are professionally managed and less risk averse than individual shareholders, or because they can more carefully weigh the potential benefits against the risks, or because their shareholders are already shielded by limited liability. *See, e.g.*, Blumberg 3.02.1 at 60; Frank Easterbrook and Daniel R. Fischel, "Corporate Control Transactions," 91 YALE L.J. 698 (1982); Henry Hansmann and Rainer Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts," 100 YALE L.J. 1879, 1882 (1991). Some commentators argue that while limited liability may be defensible in relations between a corporation and its "voluntary creditors" (e.g. persons who choose to do business with it and can assess the risks to it of its counterpart's limited liability), it is not warranted with respect to "involuntary creditors," including members of the public who are tort victims. We need not address that issue here; it is well settled in state law of corporations that the current law makes no such distinction, and it is not the function of the judicial branch to make new social policy. We submit, moreover, that the doctrine of "piercing the corporate veil" was developed to moderate the inequities that can arise from a too slavish invocation of lack of parent liability.

III. THE DEFINITION ADVANCED BY THE UNITED STATES IS UNTENABLE AND IMPRUDENT

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means what I choose it to mean -- neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> The question is," said Humpty Dumpty, which is to be the master -- that's all."

Lewis Carroll, ALICE'S ADVENTURES IN WONDERLAND, ch. 6 (1865)

The United States advances an argument that pretends to take a "middle path" between the extreme position adopted by some circuits of imposing liability based on a parent company's capacity to control the subsidiary (but not specifically the offending facility)[6] and the traditional veil piercing test that requires a close connection between the parent and its subsidiary's acts[7].

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[6] Three circuits have adopted this "capacity to control approach at one time: *Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1341-1342 (9th Cir. 1992); *Nurad Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied, Mumaw v. Nurad, Inc.*, 113 S.Ct. 377 (1992); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051-1053 (2d Cir. 1985).

[7] Adopted by two circuits: *Joslyn Mfg.. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991) and the Sixth Circuit in this case.

While the position of the United States is articulated so that it appears to be in accord with the plurality of circuits that have adopted an "actual control" of the subsidiary test[8], its position really is little more searching than the "capacity to control" approach. The United States, almost at the very end of its brief (Petitioner's Brief at 44), discloses its true position: it advocates the creation of a new federal common law of corporate parental liability which would hold a parent liable under CERCLA if the parent exercised any control over the subsidiary, other than that of a passive investor, regardless of whether the parent exercised any actual control over the offending facility. The United States suggests that if a parent corporation employs any of its "own agents"[9] "to manage the subsidiary," the parent would be liable as an operator. The test proposed by the United States ignores the plain meaning of the statute. To be liable as an operator, one must have "operated" the facility at which the waste was disposed of. The test advanced by the United States would focus on control by the parent over a subsidiary,rather than control over a particular facility[10].

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[8] *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996).

[9] The term "own agents" is not defined, but presumably means officers or managers employed by the parent who also perform some functions as employees of the subsidiary. It is not clear whether the United States would include "staff" positions, such as personnel of the accounting or law departments of the parent, or even the staff of a research lab owned by the parent, but which give advice to the subsidiary, or whether the test is limited to "line" personnel.

[10] A parent company might, for example, exercise some aspects of management control at the subsidiary's corporate headquarters, but exercise no such control "in the field." Likewise, the

In the last sentence of that same paragraph, the United States argues that the courts should make a factual inquiry whether the evidence demonstrates that the parent's "officers exercised control over the operations and management of the subsidiary's activities in a way that establishes that those officers actually participated in the operation of the subsidiary's facility."[11] These very contradictory or inconsistent tests articulated by the United States in this case exemplifies the difficulty in establishing a federal common law rule. The first articulation of the standard proposed by the United States incorrectly shifts the focus from the operation of the facility to participation by a parent in the overall management of its subsidiary[12]. The second articulation, while seeming not to embark on that deviation, would discourage parent corporations from vigilantly acting to advance the very purpose of CERCLA and related environmental statutes -- to prevent and, if necessary, quickly remediate, environmental hazards.

---

parent might exercise operational control over one of a subsidiary's facilities, but not at the facility where waste was generated, discharged or stored.

[11] Again, the United States does not explain what criteria should be applied to determine whether an officer of the parent company who participated in some operations of the subsidiary "actually participated" in the operation of the subsidiary's [offending] facility."

[12] Such a definition would ensnare virtually all parent corporations, for very few simply acquire ownership without also exercising some oversight or control.

IV. SUBSTITUTION OF JUDICIALLY MADE FEDERAL COMMON LAW FOR WELL ESTABLISHED AND ARTICULATED STATE LAW IS UNWARRANTED IN THE ABSENCE OF CLEARLY EXPRESSED CONGRESSIONAL INTENT

It is unwarranted for this Court to infer from the circular definitions in CERCLA and the absence of expression of legislative intent that Congress had determined to upset the long accepted principles of corporate limited liability and to substitute a much broader concept of "control" as part of "federal common law." This Court has stated that only in "extraordinary cases judicial creation of a federal rule of decision is warranted" and such "cases. . . are 'few and restricted.'" *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87, 89 (1994); *see also Atherton v. F.D.I.C.*, 117 S.Ct. 666, 670 (1997). Petitioner's invocation of the "remedial" nature of CERCLA and other policy arguments for expanding the net of responsibility simply do not meet the tests articulated in *O'Melveny* and in *Atherton*. There is no demonstrated need for national uniformity (indeed the split among the circuits indicates that the attempt to craft a federal common law has led to less uniformity and less predictability). *Compare, for example, U.S. v. Kayser-Roth Corp.*, 910 F.2d at 27 (1st Cir. 1990) *with Lansford-Coaldale Water Auth.. V. Tonolli*, 4 F.3d 1209, 1221 (3d Cir. 1993); *see Atherton*, 117 S.Ct. 666, 671.

This Court should not accept the invitation of the United States to embark on a "facile approach to federal-common-law-making" (*O'Melveny*, 512 U.S. at 89) which only articulates another fact-intensive inquiry while creating a federal rule no more satisfactory, and probably far less advantageous, than state law doctrines of corporate limited

liability and piercing the corporate veil that have been articulated and developed over almost two centuries to achieve purposes that are fundamentally important to our economic and justice systems -- creation of wealth, efficient markets, innovation and avoidance of injustice. The United States has not demonstrated that -- aside from losing this case -- the state law principles of corporate veil piercing are inadequate to effective enforcement of CERCLA as written.

The very fact that Petitioner seeks to have this Court make federal common law is a tacit admission, we submit, that Congress did not create a standard of "responsibility" in accord with the desires of the Petitioner. We also submit that the controversy about the correct interpretation of "owner or operator" as used in section 107(a)(ii) of CERCLA has been sufficiently notorious that if Congress desired to redefine or clarify the terms, it would have done so.

In this case, the concept of federal-common-law-making conflicts with the distinct functions of the legislative and judicial branches. Congress' silence does not indicate that federal courts should develop a federal "common law" rule, *O'Melveny*, 512 U.S. at 85, but rather indicates that, except in the "unusual" case, federal courts should either defer to a fully articulated body of state law or await Congressional action.

"The question is," indeed, "which is to be master." We submit, respectfully, that in this matter Congress -- not Petitioner and not the judiciary -- is master and should be so recognized.

CONCLUSION

The judgment of the court of appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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February 1998

CERTIFICATE OF SERVICE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL, INC.), ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATIONAL FOUNDATION; U.S. REPRESENTATIVES MICHAEL G. OXLEY, JOE BARTON, TOM DeLAY, BILL GOODLING, AND BOB BARR IN SUPPORT OF CORPORATE RESPONDENTS

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BRIEF OF AMICI CURIAE
THE WASHINGTON LEGAL FOUNDATION;
THE ALLIED EDUCATIONAL FOUNDATION;
U.S. REPRESENTATIVES MICHAEL G. OXLEY
JOE BARTON, TOM DeLAY,
BILL GOODLING, AND BOB BARR
IN SUPPORT OF CORPORATE RESPONDENTS

INTEREST OF AMICI CURIAE[1/]

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide, including many who are subject to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq*. WLF also has a substantial interest in the development and application of appropriate principles to limit the extent to which federal regulatory statutes displace state law in areas traditionally regulated by the States. The Allied Educational Foundation (AEF) is a non-profit public policy organization that shares many of WLF's interests. WLF appeared as amicus curiae in this case when it was before the U.S. Court of Appeals for the Sixth Circuit, and both WLF and AEF appeared together in other relevant cases before this Court. *See, e.g.*, *Atherton v. FDIC*, 117 S.Ct. 666 (1997).

Congressional amici U.S. Representatives Michael G. Oxley, Joe Barton, Tom DeLay, Bill Goodling, and Bob Barr also have a strong interest in this case as Members of

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[1/] Pursuant to Supreme Court Rule 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than amicus Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consent of the parties.

Congress and congressional leaders.[2/] As legislators, they have a particular interest in the proper interpretation of CERCLA, and object to a broader reading of CERCLA than what Congress originally intended. They have also appeared as co-amici with WLF and other Members of Congress in another CERCLA case opposing the retroactive application of CERLCA as being contrary to the intent of Congress and constitutionally suspect. *See Olin v. United States*, 107 F.3d 1502 (11th Cir. 1996).

Indeed, amici are concerned with the practice of the courts to "legislate" in CERCLA cases involving liability issues which the Congress either avoided or failed to clearly address. Thus, we have the spectacle of federal courts propounding federal rules of decision to deduce the liability of corporate officers, *Bowen Engineering v. Estate of Reeve*, 799 F. Supp 467, 474, *aff'd without op.*, 993 F.2d 223 (3d Cir. 1993), and successors, *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992). Very recently, this Court has been asked to create a federal common law standard to adjudge the liability of individual corporate shareholders. *Donahey v. Livingstone, petition for cert. filed*, 66 U.S.L.W. 3475 (U.S. Jan. 9, 1998).

Accordingly, amici can bring a broader perspective to this case than the parties, and believe that this case provides

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[2/] Mr. Oxley is Chairman of the Subcommittee of Finance and Hazardous Materials of the House Commerce Committee; Mr. Barton is Chairman of the Subcommittee of Oversight and Investigations of the Commerce Committee; Mr. DeLay is House Majority Whip and member of the Appropriations Committee; Mr. Goodling is Chairman of the Committee on Education and the Workforce; and Mr. Barr is a member of the Judiciary, Government Reform and Oversight, and Banking and Financial Services Committees.

an opportunity for the Court to impose the proper discipline on these related CERCLA issues, and to provide needed direction in an area that swirls with controversy. Alternatively, the Court can send Congress a strong message that CERCLA is badly in need of repair.

SUMMARY OF ARGUMENT

The Court has established a clear discipline for determining whether to create federal common law standards, and application of that discipline counsels against adopting a federal common law standard in this case. Because no significant conflict exists between any federal policy or interest that proponents of a federal common law standard might advance and the use of state common law, there is no justification for creating a federal rule of decision to construe the term "operated." None of the purported federal interests advanced by proponents of a federal rule of decision--uniformity, imposition of liability on responsible parties, or the statute's remedial purpose — raise a significant conflict with the use of state common law.

The Court should not be deceived by notions of statutory interpretation into abandoning the governing discipline for determining whether to adopt a federal common law standard. Proponents of a federal common law standard are unconvincing when they argue that the word "operated"--no more and no less--expresses clear congressional intent to displace a well-established body of state common law. Moreover, certain statutory interpretation notions advanced by proponents of a federal common law standard simply do not support the contention that the statutory term "operated" allows imposition of so-called "direct" liability on corporate parents. In sum, proponents of a federal rule of decision have failed to meet the heavy burden of justifying creation of such a rule.

ARGUMENT

I. CREATING A FEDERAL RULE OF DECISION TO CONSTRUE THE TERM "OPERATED" IS UNJUSTIFIED, BECAUSE NO SIGNIFICANT CONFLICT EXISTS BETWEEN A FEDERAL POLICY OR INTEREST AND THE USE OF STATE COMMON LAW

The case before the Court does not present one of the "few and restricted" instances in which creation of a special federal rule of decision is warranted to avoid a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (citations omitted). Proponents of a federal rule of decision would have the Court create federal common law to determine a parent corporation's liability under CERCLA section 107(a)(2).[3/] Because the use of state common law does not create a "significant conflict" with any of the purported federal interests--uniformity, imposition of liability on responsible parties, or CERCLA's remedial purpose--the adoption of a federal rule to construe the term "operated" is not justified.

A. As a Precondition to Establishing a Federal Rule of Decision, Petitioner Must Demonstrate that the Use of State Common Law Would Result in a "Significant Conflict" with a Federal Interest

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[3/]Section 107(a)(2) of CERCLA imposes liability for cleanup costs on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2) (1997).

A "significant conflict between some policy or interest and the use of state law" is a "precondition for recognition of a federal rule of decision" for judging a parent corporation's operator liability under CERCLA. *O'Melveny*, 512 U.S. at 87. Congress did not define the meaning of the term "operated" as used in CERCLA section 107(a)(2). Construing the term "operated" to create "direct" CERCLA liability for parent corporations would constitute the creation of a federal rule of decision. The displacement of state law in the case at bar cannot be justified under *O'Melveny*. Absent any significant conflict between a federal policy or interest and use of state law, matters left unaddressed in comprehensive and detailed federal statutory schemes are left subject to disposition provided by state law. *O'Melveny*, 512 U.S. at 85-89.

The presumption that state law should govern is "particularly strong" in the "corporate law" arena, "in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Financial Services*, 500 U.S. 90, 98 (1991) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 739 (1979)). Indeed, this case concerns the limited liability of corporations, recognized as "one of the first principles of American law," and which may be the single most fundamental principle in American corporate law. Stephen Presser, *Piercing the Corporate Veil*, § 1.01 at 1-4 (1997) (hereinafter "Presser, *Piercing*"); Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporate Problems*, at 14 (1927). Petitioner has not overcome the presumption that state common law provides the appropriate standard of liability, as it has not demonstrated under the governing discipline that the case at bar is one of those "extraordinary cases in which the judicial creation of a

federal rule of decision is warranted." *O'Melveny*, 512 U.S. at 89.

The creation of a federal rule of decision to determine the CERCLA liability of parent corporations in the case at bar would also violate the Rule of Decisions Act. 28 U.S.C. § 1652 (1997). The Act provides that:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652. The Act creates a presumption that state common law--not federal common law--applies in all civil litigation (not just in diversity cases) except to the extent that a federal statute, treaty or Constitutional provision authorizes or requires a different rule of decision.

In the case at bar, CERCLA does not require the application of a federal rule of decision to determine a parent corporation's liability under Section 107(a)(2). CERCLA does not expressly contain language compelling such a result, and proponents of a federal rule of decision have failed to establish that the application of state common law would create a "significant conflict" with a federal policy or interest. As a result, the presumption of the Rules of Decision Act applies, and state common law provides the governing rule of decision.

B. No "Significant Conflict" Exists Between Purported Federal Interests and the Use of State Common Law to Determine Parent Corporation Liability

Proponents of a federal rule of decision have alluded to certain federal policies or interests that they hope the Court would characterize as conflicting with the use of state law, thereby establishing the basis for a federal rule of decision. For reasons set forth below, none of these policies or interests provides a sufficient basis for displacing state common law.

1. *The Alleged Quest for National Uniformity Is Not a Sufficient Basis for Displacing State Common Law*

The Court should not recognize a federal rule of decision where an alleged need for uniformity belies a desire to alter governing legal principles. The alleged need for a nationally uniform standard for parent corporation liability under CERCLA does not constitute a sufficient federal interest upon which to found federal common law. Moreover, proponents of a federal rule of decision are not truly seeking a uniform standard, but rather seek to alter the state common law principles that govern determinations of corporate parent liability, a result the Court will not countenance.

The stated need for uniformity does not provide a sufficient federal interest upon which to found federal common law. As the Court recently stated, "[t]o invoke the concept of 'uniformity' ... is not to prove its need." *Atherton v. FDIC*, 117 S.Ct. 666, 671 (1997); *see also O'Melveny*, 512 U.S. at 88 (rejecting the notion that facilitating FDIC's nationwide litigation of similar suits qualified as an identifiable federal interest). The Ninth Circuit Court of Appeals concluded that the *O'Melveny* Court placed a "heavy burden" on a party intending to prove "the need for uniformity." *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1299

(9th Cir. 1997). In the case at bar, proponents of a federal rule of decision have not carried this heavy burden.

Neither the circuit court decisions on which proponents of a federal common law standard rely, nor their own attempts at cohesion, demonstrate the uniformity they seek. The decisions of the circuit courts that have embraced a federal common law standard demonstrate the elusiveness of uniformity. A close reading of the passages from the Petitioner's summary of these decisions reveals this. U.S. Br. at 29-30 citing *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 490 U.S. 1084 (1991) ("pervasive involvement in the subsidiary's operations") and 27 ("a parent corporation that participates in the operation of a subsidiary's facility"); *Schiavone v. Pearce*, 79 F.3d 248, 254 (2nd Cir. 1996) ("based on 'the independent actions of the parent corporation, evidenced through its control over the polluting site'"); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) ("there is evidence of substantial control exercised by one corporation over the activities of the other"); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) ("when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise."). Proponents of a federal rule of decision find it impossible themselves to state the standard in a uniform fashion. Petitioner states the standard in numerous different ways. In order to discern the lack of uniformity, the Court need only examine the words that follow the phrase "actively participates in, and exercises control over" in what Petitioner claims is the appropriate distillation of the standard.[4/]

[4/] U.S. Br. at (I) ("the operations of a subsidiary"); (III) ("the operation of a subsidiary's facility"); 8 ("[the subsidiary's] business, including environmental matters, through the direct involvement of [parent] officers in [the subsidiary's] policy decisions and day-to-day operations"); 16 ("operation of a facility"); 17 ("the running of the facility," "the operations of a subsidiary's facility"); 18 ("the operations of the subsidiary's facility"); 21 ("running of the facility"); 23 ("the management of a facility"); 24 ("managerial or decision-making control over a facility's operations"); 25 ("managerial or decision-making control over the operations of a facility"); 32 ("the operation of a facility," "the operation of the facility"); 34 ("the operation of a subsidiary's facility"); 35 ("the facility in question"); 41 ("the day-to-day operation of a subsidiary and its facility," "the operation of the facility"); 42 ("the operations of the subsidiary in a manner that constitutes operation of the facility"); and 44 ("the operations and management of the subsidiary's activities in a way that establishes that [the parent's] officers actually participated in the operation of the subsidiary's facility").

While not necessarily uniform, state common law standards share strong similarities.[5/] The veil-piercing test employed by states to judge parent corporation liability generally have two dominant requirements: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer

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[5/] The similarity alone might provide the Court with a basis for forebearing from creating a federal rule of decision. As the Ninth Circuit has stated:

> [T]here has been no real explanation of the need for uniformity in the particular area of successor liability -- especially since state law will in many other instances determine whom the EPA may or may not look to for compensation. If state law varied widely on the issue of successor liability, perhaps the need for a uniform federal rule would be more apparent.

Atchison, 132 F.3d at 1300.

exist, and (2) the circumstances must indicate that adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice. 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 41.30 (1990); *see also* Presser, *Piercing*, ch. 2, at 1-540 (analyzing veil-piercing tests of the fifty states, of which approximately forty states require the showing of both requirements to pierce the corporate veil).

Moreover, proponents of a federal rule of decision do not truly seek uniformity, but rather hope to have the Court substantially alter the otherwise governing state common law. It is the second dominant requirement of the states' common law standards--adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice--that proponents of a federal rule of decision seek to eliminate. Michigan law allows the corporate veil to be pierced only upon a finding of fraudulent purpose, injustice, or circumvention of public policy, and the Sixth Circuit determined that the facts presented were not sufficient to make such a finding. *CPC International Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 574, 578-79 (W.D. Mich. 1991). Petitioner enumerates detailed factual findings regarding CPC's activities that relate to the first dominant requirement under state common law that the separate personalities of the parent and subsidiary no longer exist. U.S. Br. at 12. It becomes apparent, then, that Petitioner advocates a federal rule of decision to *alter* the governing law to eliminate the second dominant requirement under the governing state common law.[9]

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[9] The Fifth Circuit concurs with the Sixth Circuit that elimination of this second dominant requirement is not warranted, and the Court should not be deceived by suggestions to the contrary. The distinction that Amici States draw between the Fifth Circuit's decision in *Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991), and the case before the Court presently, Amici States Br. at 17, does not undermine the Fifth Circuit's fundamental agreement with the Sixth Circuit that a federal common law standard is unwarranted. Amici States appear to want to diminish the significance of Fifth Circuit's concurrence with the Sixth Circuit by noting that, in *Joslyn*, the Fifth Circuit did not have facts before it to suggest that the "parent corporation had actually participated by its own acts in managing the operations of the subsidiary." *Id.* That the *Joslyn* court ruled on distinguishable facts does not diminish the significance of its holding that it would not impose "operator" liability on a parent corporation unless the corporate veil could be pierced under state common law principles. 893 F.2d at 82-83.

The Court should not countenance such an alteration under the guise of attempting to achieve uniformity. To do otherwise would, as the Court has declared, "create additional 'federal common law' exceptions" that would "not . . . 'supplement' this scheme but . . . alter it." *O'Melveny*, 512 U.S. at 87. The Ninth Circuit recently rejected a similar plea for purported uniformity as relates to corporate successor liability with reasoning equally applicable to the issue of parent corporation liability.

> The argued "need" for uniformity thus stems not from discrepancy among the various states, but from the alleged need for a more expansive view of successor liability than state law currently provides -- in other words, the notion that state law on this issue is inadequate for CERCLA's purposes.

Atchison, 132 F.3d at 1300. *See also Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996) (rejecting need for uniform federal rule to determine successor liability of corporations under CERCLA).

Because the desire for federal uniformity in this case is not in itself a sufficient interest to warrant a federal common law standard, and because the true aim of federal common law proponents is to supplant--not supplement--the statute, the Court can again conclude: "There is not . . . at stake that most generic . . . of alleged federal interests, the interest in uniformity." *O'Melveny*, 512 U.S. at 88.

2. *Using State Common Law To Determine Corporate Parent Liability Does Not Create a Significant Conflict With CERCLA's Imposition of Cleanup Costs on "Responsible Parties"*

Determining a parent corporation's liability under a state common law standard does not create a significant conflict with CERCLA's imposition of cleanup costs on responsible parties. A state common law veil-piercing standard effects the proper balance between the protection afforded by the corporate form and CERCLA's imposition of cleanup costs on responsible parties. Recent decisions of the Ninth and Eleventh Circuit Courts of Appeal support the use of a state common law standard to balance CERCLA's purposes with corporate law principles. Furthermore, the admitted infrequency with which Petitioner seeks to hold a parent corporation liable on the basis that it "operated" its subsidiary or its subsidiary's facility shows that a conflict, if any, between a federal interest and use of a state common law standard cannot be "significant."

Proponents of the development of a federal common law standard contend that the Court will somehow subvert the statute's goal of imposing costs on "responsible parties" if it fails to impute "direct" liability to corporate parents. U.S. Br. at 4-5 (citations to legislative history regarding those "responsible" for any damage); 7 (citations to

legislative history regarding those who "cause such damage" to "benefit with impunity"); and 41 (goal of imposing the costs of cleanup on those who are responsible for creating hazardous conditions). It is uncontested that CERCLA attempts to impose cleanup costs on "responsible parties." Proponents of a federal rule of decision have not demonstrated, however, that there is a federal interest in capturing parent corporations as "responsible parties" in instances in which state common law would not.

State common law effects the appropriate balance between the protection afforded by the corporate form and competing public policy objectives, such as CERCLA's imposition of liability on "responsible parties." The effect of the corporate form, and the circumstances under which that form may be disregarded are traditionally matters of state, not federal, law. "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute." *Burks v. Lasker*, 441 U.S. 471, 478 (1978). That a parent corporation might "elude" CERCLA liability by virtue of its maintaining the integrity of the corporate form and not utilizing the corporate form to perpetrate a fraud--so as to prevent the corporate veil from being pierced--is entirely consistent with the tenet that "[a] surrender of the principle of limited liability can only be made 'when the sacrifice is essential to the end that some accepted public policy may be defended or upheld.'" *Anderson v. Abbott*, 321 U.S. at 362 (quoting Chief Judge Cardozo's opinion in *Berkey v. Third Ave. Ry. Co*, 244 N.Y. 84, 95 (1926)). It merely recognizes that Congress has not, in this instance, abrogated the limited liability afforded through the corporate form.[7/]

[7/] Petitioner's contention to the contrary is based upon a troubling circularity. Petitioner contends that the courts must

Both the Ninth and Eleventh Circuit Courts of Appeals have recently recognized that state common law effects the appropriate balance between corporate limited liability and CERCLA's imposition of cleanup costs on responsible parties. *Atchison*, 132 F.3d at 1299-1301 (holding that the successor liability of a corporation should be judged under state law); and *Redwing Carriers*, 94 F.3d at 1489 (applying state common law to determine CERCLA liability of limited partners for violations committed by partnership). In *Atchison*, the Ninth Circuit found no evidence that the application of state corporate law would frustrate CERCLA's objective of imposing the costs of cleanup on those responsible for the contamination. The court stated, "[n]o state provides a haven for liable companies. Nor is there reason to think that states will alter their existing successor liability rules in a 'race to the bottom' to attract corporate business." 132 F.3d at 1301 (quoting in part *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J. concurring). The court recognized that "successor liability rules were, after all, developed to address much more than environmental liability." *Id.* at 1301.

In *Redwing Carriers*, the Eleventh Circuit decided that state common law, not a federal rule of decision, governed the question of whether a limited partner could be held

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adopt a federal common law standard to impose Superfund liability on corporate parents without reference to state common law veil-piercing. U.S. Br. at 41 ("CERCLA *dictates* that the corporation should be responsible") (emphasis added). But Petitioner's reasoning begs the question it intends to answer. It demands the Court find that corporate parents are "responsible parties" without analyzing how--whether by the use of state or federal common law--one determines who Congress intended to include as "responsible."

accountable for the CERCLA liability of the partnership. As in *Atchison*, the court rejected the argument that applying a state common law standard would defeat CERCLA's goal of having "responsible parties" pay. *Redwing Carriers*, 94 F.3d at 1502. The *Redwing Carriers* court found that state rules permit plaintiffs to hold limited partners accountable for a partnership's CERCLA liability under certain circumstances, and that it did "not foresee states enacting more protective statutes in an effort to defeat CERCLA's goal of having the polluter pay." *Id.* The *Atchison* and *Redwing Carriers* reasoning holds true in the context of parent corporation liability as well. Because states have a substantial interest in protecting their citizens and natural resources, they also have an interest in ensuring that parent corporations do not unjustly avoid liability--environmental or otherwise.

Even if there were a federal interest in imposing Superfund liability on corporate parents where state common law would not, it would still fail to provide a sound basis for displacing state common law, because--under the governing legal discipline--the interest would not be in "significant conflict" with the use of state common law. Petitioner appears to acknowledge that use of state common law does not create a "significant" conflict with Petitioner's purported federal interest. In its petition for certiorari, the government conceded the infrequency with which it seeks to hold a parent corporation liable on the basis that it "operated" its subsidiary's facility. U.S. Pet. at 26-27 (stating that the government "does not routinely" seek to hold parent corporations liable for conditions at a subsidiary's facility). If that is the case, then it is difficult to imagine how curtailing the capture of parent corporations in CERCLA's liability net in these limited instances could create a "significant" conflict. *Cf. Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) ("To the point that courts could achieve 'more' of the

legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits.").

As a result, the Court should reject the contention that failure to impute a federal rule of decision will "disserve the federal program" just as it has previously rejected attempts to "presume to judge what constitutes malpractice" on the basis of similar claims. *O'Melveny*, 512 U.S. at 89. The underlying concern with the "runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy," *id.*, remains the same whether the Court is asked to second guess what constitutes malpractice, as in was in *O'Melveny*, or, as it is in the instant case, the circumstances in which parent corporations should be held liable.

3. *Abiding by State Common Law Does Not Frustrate CERCLA's Remedial Purpose*

Applying a state common law standard to determine parent corporation liability will not frustrate CERCLA's remedial purpose. Petitioner and Respondent Michigan DEQ ("MDEQ") accurately observe that advancement of the statute's remedial purpose constitutes a federal interest. U.S. Br. at 40, MDEQ Br. at 17. Federal common law proponents have not been able to demonstrate, however, that in instances in which the corporate veil cannot be pierced under state common law, the statute's remedial purpose will in fact be frustrated.

CERCLA cleanups will *not* come to a halt if parent corporations are adjudged according to state common law veil-piercing standards. The Superfund trust fund exists to finance removal and response actions, so that money will be available for cleanups even if--as in the instant case--certain

parent corporations are adjudged not to be liable under a state common law veil-piercing standard. The trust fund, funded primarily by taxes on the oil and gas industry and a broad-based corporate environmental income tax, exists as a source of government monies to carry out cleanup actions authorized by the statute. 42 U.S.C. § 9611; *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986). While the statute confers upon the government the right to recoup amounts expended from the trust fund, the statute does not require that every dollar expended from the fund is to be recovered.[8/] 42 U.S.C. § 9611. The Environmental Protection Agency's own policies contemplate use of trust fund monies without reimbursement. For example, EPA uses the fund without reimbursement in instances in which liable responsible parties are insolvent, and hence who will not contribute toward cleanup costs. EPA policy adopts an approach of "mixed funding" (combining money from responsible parties and the trust fund) "to promote settlement and hazardous site cleanup" at those sites at which PRPs are financially unable to fund the entire cleanup. U.S. Environmental Protection Agency, Evaluating Mixed Funding Settlements Under CERCLA, at 2 (Oct. 20, 1987). Thus, the trust fund's very existence; the fact that "there is no federal policy that the fund should always win" *O'Melveny*, 512 U.S. at 88; and because the Court has "previously rejected 'more money' arguments remarkably similar to the one made here," *id.* at

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[8/] Of course, the statute's joint-and-several liability regime eases replenishment of the fund by allowing the government to sue one responsible party for the entire costs of the cleanup, regardless of whether other parties were responsible for the release of hazardous substances at the site. *See, e.g., United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 267-71 (2d Cir. 1992).

88 (citations omitted),[2/] all weigh against finding that the statute's remedial purpose constitutes a federal interest that will be sacrificed through use of state common law.

[2/] While not advancing a "federal interest or policy" for purposes of the *O'Melveny* analysis, Amici States contend that failing to displace state common law will "shift cleanup costs and responsibilities from responsible persons to states and their taxpayers." Amici States Br. at 4, 5. Even had Amici States adequately explained how this result would be brought about, it is not a federal interest that could provide a foundation for creation of a federal rule of decision. Moreover, Amici States could address the perceived problem directly by amending their "Little Superfund" statutes to make it easier to pierce the corporate veil to impose cleanup liability on parent corporations. *See* Robert B. McKinstry, Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response Compensation and Liability Act*, 5 Vill. Envtl. L.J. 83 (1994) (for a general discussion of state Superfund laws). Certainly, state legislatures are not unaware of the second dominant requirement in veil-piercing tests and their ability to alter it. *Cf.* La. Rev. Stat. Ann, tit. 12, § 93 (1997) (adopting veil-piercing standard that does not require a showing of fraud or injustice, albeit outside the CERCLA context). Nor are states unaware of their ability to alter the Superfund liability regime. *See Schiavone*, 79 F.3d at 255-56 (discussing Connecticut little-Superfund statute requiring showing of culpability). It follows then, that states could seek relief legislatively rather than appealing for a federal rule of decision.

II. NEITHER THE "ORDINARY AND NATURAL" MEANING OF THE TERM "OPERATED" NOR THEORIES OF STATUTORY INTERPRETATION ADVANCED BY PROPONENTS OF THE DISPLACEMENT OF STATE COMMON LAW PROVIDE A BASIS FOR VITIATING THE CORPORATE FORM

The Court could only adopt a federal rule of decision in this case by doing substantial violence to fundamental principles of corporate law. Neither the "ordinary and natural" meaning of the term "operated" advanced by proponents of a federal rule of decision nor other notions of statutory interpretation establish a sound basis for taking such action.

A. The "Ordinary and Natural" Meaning of the Term "Operated" Does Not Evince A Congressional Intent To Impose "Direct" Liability on Corporate Parents

Proponents of a federal rule of decision urge an "ordinary and natural" meaning for the term "operated" that a careful reading of the statute and permissible inferences do not support. In the enactment of statutes, the legislature is presumed to have considered the state of the common law. *United States v. Texas*, 507 U.S. 529, 534 (1993); *Thompson v. Thompson*, 218 U.S. 611, 612 (1910). It is a longstanding principle that a statute "is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Pennsylvania R. Co.*, 101 U.S. 557, 565 (1879); 3 *Sutherland Statutory Construction*, § 61.01 (1992). To alter the common law, "the language of the statute must be clear and explicit." *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983). Contrary to the interpretations urged by

proponents of a federal rule of decision, the "ordinary and natural" meaning of the term "operated" can be given effect without "making any innovation upon the common law" not intended by Congress. The Court should also not be swayed by inferences drawn from the statutory definitions of the terms "owner" and "person" or from the use of the disjunctive to support the notion of "direct" liability advanced by federal common law proponents.

1. *Dictionary Definitions Do Not Provide Persuasive Authority for "Direct" Liability*

Dictionary definitions aside, Congress did not use the word "operated" to pronounce a new standard of liability for corporate parents. Certainly, in including "operated" with "owned" in CERCLA section 107(a)(2), Congress intended to include more than simply site owners within this category of liable parties. The use of the word "operated," however, would not only be a strange and obtuse way to supersede the traditional protection of the corporate form, but would be contrary to the Court's teaching that Congress must speak clearly and explicitly to abrogate established principles of state common law. *Norfolk Redevelopment & Housing. Auth.*, 464 U.S. at 35-36.

The fact of the matter is that the "ordinary and natural" meaning of the term has nothing to do with imposition of liability without regard to corporate form. The natural meaning of the phrase "any person who owned or operated" a facility-- including all the dictionary definitions offered by Petitioner (U.S. Br. at 20-21)--simply extends liability to both the owner and operator when a site is owned by one person and operated by another. In other words, the term "operated" imposes liability on tenants, lessees, and contract operators who do not own the facility but "manage" or "direct the working of" the facility's operations. U.S. Br.

at 20 (quoting *The Oxford English Dictionary* (2d ed. 1989)). To go beyond that to suggest that in using this term Congress intended to impose liability without regard to corporate form is unwarranted. The fiction of "direct" liability that Petitioner posits begs the question that can only be answered in accordance with the rules that govern creation of federal common law. It is far too facile to reckon that CERCLA liability attaches directly to the parent not because of the acts of its subsidiary but because of its "own acts." U.S. Br. at 33 (arguing that direct liability arises, because, under principles of corporate law, a corporation is not insulated from liability for its own acts). Whether liability attaches to the parent is at the crux of the current controversy, and must be determined in accordance with the rules established for the creation of federal common law.

In fact, there is simply no support in the language of the statute that Congress intended courts to determine liability of parent corporations through the use of any standard than other than the state common law test of piercing the corporate veil. *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); *cf. United States v. USX Corp.*, 68 F.3d 811, 824 (3d Cir. 1995) (discussing lack of Congressional intent to obviate corporate form in context of parent corporation's "transporter" liability); and *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995) (rejecting a "control" test for determination of parent corporation's "arranger" liability). In *Joslyn*, the Fifth Circuit panel examined CERCLA's language, noting that Congress specifically created "owner or operator" liability based upon "control" of a facility, but that it limited the application of the "control" standard to certain circumstances. *Id.* at 83. "The term 'owner or operator' is defined for facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment, as 'any

person who owned, operated, *or otherwise controlled* activities at such facility immediately' before conveyance." *Id.* (quoting in part 42 U.S.C. § 9601(A)(iii)) (emphasis added by the court). The *Joslyn* court concluded that, by its expressed use of a "control" standard in limited situations, Congress manifested its intention not to displace the rule of traditional limited liability absent a piercing of the corporate veil in other situations concerning parent corporations. *Id.; see also* Dent, *Limited Liability in Environmental Law*, 26 Wake Forest L. Rev. 151, 156 (1991) (concluding that the failure to apply "control" standard of liability in previous subsection of CERCLA does not appear to be a mere oversight).

2. *Statutory Definitions of "Person" and "Owner" Do Not Support the Concept of "Direct" Liability*

The statutory definition of the term "person" to include "corporations" provides no basis for concluding that Congress intended to impose "direct" liability on parent corporations. In fact, quite the opposite is a more logical conclusion. The inclusion of the term "corporation," as well as "association" and "partnership" (none of which are expressly defined in the statute), must mean that Congress was embracing the meanings of those terms as they existed at law. *Nationwide Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992); *Shaw*, 101 U.S. at 565. Petitioner and MDEQ ignore the fact that inclusion of the term "corporation" within the statutory definition of the term "person" must borrow the body of law that governs these creations of state charter.

By including the undefined term "corporation" in the statutory definition of "person," Congress must be presumed to have intended to have federal courts rely on state corporate law principles. *See Darden*, 503 U.S. at 322;

Kamen, 500 U.S. at 98-99; and *Burks*, 441 U.S. at 478. Certainly, Congress intended for the term "corporation" in CERCLA to mean the limited liability entities created by state charter. The "particularly strong" presumption that arises, then, in this "corporate law" arena, is that Congress embraced the state law that governs the "rights and obligations" of those entities. *Kamen*, 500 U.S. at 98. At least one court has applied a similar reasoning to limited partnerships. *Redwing*, 94 F.3d at 1506 (question of whether a limited partner will lose the protection generally afforded limited partners by virtue of his or her more active role in the partnership will be governed by the applicable state law that governs limited partnerships).

Nor does the statutory definition of the term "owner" provide a reasoned basis for concluding that Congress intended the term "operated" to impose direct responsibility on parent corporations. Respondent MDEQ encourages the Court to accept as a negative inference from the statutory definition of the term "owner," that Congress intended that one who participates in the management of a facility (regardless of corporate form) be liable. MDEQ Br. at 7. The statutory definition of "owner" explicitly excludes a person that is "merely that of a stockholder who does not participate in the management of a facility." *Id.*, citing 42 U.S.C. 9601(20)(A)(ii). From that exclusion, MDEQ encourages the Court to make the leap to the notion that Congress intended "operated" to include all those who do participate in the facility's management. It is not permissible to infer (or, as is the case here, to take as the negative implication) a meaning for one term on the basis of Congress's explicit directions with respect to another term. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (rejecting request to read meaning into absence of statutory language in one section as opposed to another).

3. *Recognition of Congress's Use of the Disjunctive Does Not Require Abrogation of the Corporate Form*

Proponents of a federal common law standard suggest that in order to honor Congress's use of the disjunctive "owned *or* operated," the Court must adopt a theory of "direct" liability. *See, e.g.*, U.S. Br. at 21-22. The Court can, however, recognize the significance of the use of the disjunctive--providing each of the terms with separate and distinct meanings--without abandonment of its own rules for creating federal common law.

The use of the disjunctive "owned *or* operated" indicates Congress's recognition that lessees, tenants, and contract operators may manage a facility's operations and, therefore, should be included among the classes of liable parties. Eschewing a federal rule of decision does no violence to the disjunctive "owned *or* operated." "Owner liability and operator liability [will continue] to denote two separate and distinct concepts," MDEQ's Br. at 16, if state common law is used. First, persons that hold title to a facility (including *corporate* title holders) will remain liable. Second, tenants, lessees, and contractors that do not hold title to a facility but nonetheless "manage" or "direct the work" of the facilities will also remain liable. As the two terms retain distinct meanings without imputing a federal common law meaning to the latter term, it is unnecessary to embrace the notion of "direct" liability (thereby violating rules for creation of federal common law standards) in order to honor the disjunctive nature of the two terms.[10/]

[10/] The statutory disjunctive also does not compel, as has been suggested, that there must be different standards for parent corporation liability under the terms "owned" and "operated." MDEQ's Br. at 15 ("the standard for determining whether a parent corporation is liable as either an owner or operator would be the same"). That the standard for corporate parent liability will be the same in either case is as it should be, as it adheres to state common law. What will remain distinct, however, are which parent corporations could be liable. In the first instance, parents of title holders could be liable, and, in the second, parents of (for example) lessees, tenants, and contract operators.

B. The Notion of "Direct" Liability Otherwise Relies on Incorrectly Applied Theories of Statutory Interpretation

None of the other proffered notions of statutory interpretation support the contention that Congress intended the term "operated" to create "direct" liability for parent corporations. To begin with, any effort to apply canons of statutory interpretation to CERCLA must be done cautiously. As the Third Circuit Court of Appeals has noted, because of the "inartful crafting of CERCLA," a "reliance upon general canons of statutory construction must be more tempered than usual." *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 94 (3d Cir. 1994). Viewed in this context, contentions based upon (1) the secured creditor exemption, (2) other "key terms," and (3) the remedial nature of the statute, are equally unavailing.

1. *Statutory Exceptions to the Secured Creditor Exemption Do Not Imbue the Term "Operated" With Special Meaning*

That Congress articulated a specific test for exceptions to the statutory "secured creditor exemption" is neither controlling--nor even persuasive--authority for the proposition that the term "operated" connotes "direct" corporate parent liability. Petitioner argues that the exceptions that Congress carved from the secured creditor

exemption in the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104, Tit, II, § 2502(b), 110 Stat. 3009-464 (to be codified at 42 U.S.C. § 9601(20)(E)-(F)), reveal Congress's intent with regard to the liability of parent corporations.[11/] U.S. Br. at 22-23. Petitioner would like the Court to believe that by virtue of this amendment, Congress spoke to parent corporation liability, namely that "Congress intended to impose liability on any entity that actually participated in, and exercised managerial or decision making control over, a facility's operations." *Id.* at 24.

If anything, the specificity Congress provided with respect to secured creditors weighs against Petitioner's contention. Congress did not apply the secured creditor exemption concepts to the term "operated"--something which Congress was free to do, but did not, when it amended the statute in 1996. Indeed, the facts the Petitioner presents lead to a conclusion just the opposite of the one the Petitioner advances. Congress's application of these specific concepts in connection with the secured creditor exemption--and forbearance from their application to the concept of "operated"--suggests a deliberate choice not to create a governing federal rule for determining the extent of liability for having "operated" a facility. This conclusion is more consistent with the body of the Court's teaching that, where

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11/ As Amici States explain, those "amendments . . . describe several levels of activity that will be considered participation in management by a lender," Amici States Br. at 10, thereby vitiating the secured creditor's exemption from liability. "A lender will lose its liability exclusion and become liable as an 'owner or operator' if its actions are like those of an operations manager or chief executive officer of the debtor, even if those actions do not include management of environmental compliance or practices. Id. at 11.

a legislature has acted to amend a statute to address an issue in one context, it is assumed that it did not intend to alter other aspects of the statute. *Key Tronic Corp. v. United States*, 511 U.S. 809, 818-19 (1994) (failure of SARA to provide for recovery of attorneys fees under sections 107 and 113 of CERCLA, as compared to SARA's creation of same remedy under sections 106 and 159, "strongly suggest a deliberate decision not to authorize such awards."); *Rosencrans v. United States*, 165 U.S. 257, 262 (1897).

2. *Suggested Inferences Regarding the Meaning of the Term "Operated" Drawn From the Statutory Context Are Unjustified*

That the statute supplies broad definitions to other "key terms in the broadly defined CERCLA statutory liability system," Amici States Br. at 8, is not a principled basis for construing the term "operated" to impose "direct" liability on corporate parents. Amici States contend that construing the term "operated" to impose "direct" liability is "consistent with the text and structure of CERCLA." *Id.* at 7. The "consistency" by which the Amici States hope the Court will be persuaded is allegedly found in the broad statutory definitions of several "key terms" in the statute's liability regime. *Id.* at 7-8. Specifically, Amici States cite the broad statutory definitions of the terms "release," "hazardous substance," and "facility" (as well as the "wide range of persons who are liable for cleanup costs") as support for the notion that the term "operator" must be construed similarly broadly. *Id.* at 8. Petitioner makes a similar appeal to "statutory context," though its contextual argument focuses more on the use of the disjunctive and circular reasoning about who is a responsible party. U.S. Br. at 21-22.

Appeals to the statutory context are neither controlling, nor persuasive. *See FTC v. Sun Oil Co.*, 371

U.S. 505, 515 (1963) (rejecting argument that Congress intended to invoke by omission in one section the same broad meaning explicitly provided in another section). The Court can dispense with the contention that the statute creates "direct" parent corporation liability in much the same way it rejected, in *O'Melveny*, the federal regulator's argument that its statutory grant of authority should be read as a nonexclusive grant of rights "which can be supplemented or modified by federal common law." *O'Melveny*, 512 U.S. at 86. In the *O'Melveny* case, the Court concluded that the federal regulator's argument was "demolished" by statutory provisions "which specifically create special federal rules of decision regarding claims by, and defenses against" the regulator. *Id.* The specific statutory provisions the *O'Melveny* Court identified included: (1) the extension of the statute of limitations beyond the period state laws might impose, (2) precluding state law claims against the regulator under certain contracts, and (3) permitting claims against directors and officers for gross negligence regardless of whether state law would require greater culpability. *Id.*

Similar statutory provisions likewise "demolish" the notion of "direct" parent corporation liability under CERCLA. CERCLA contains comparable statutory provisions that: (1) establish causes of action for equitable contribution and establish a statute of limitations for such actions without regard to state law, 42 U.S.C. §§ 9613, 9622; (2) limit defenses that might otherwise exist under state law, 42 U.S.C. § 9607(b); and (3) abrogate certain indemnity agreements, 42 U.S.C. § 9607(e). As a result of these similarities, the Court will just as quickly demolish the notion of "direct" parent corporation liability under CERCLA as it demolished the contention that it needed to adopt a new malpractice standard in *O'Melveny*. The statutory context in this case, with several specific "special federal rules of decision regarding claims by, and defenses against" the

regulator, suggests just the opposite of the contentions of the proponents of a federal rule of decision.

3. *Reliance on the Statute's Remedial Purpose To Construe the Term "Operated" To Impose "Direct" Liability Constitutes an Impermissible Circumvention of the Governing Analytical Framework*

The Court should not be tricked, through the guise of applying the "ordinary and natural" meaning of the term "operated," into abandoning its discipline for determining whether federal common law standards should be created. Proponents of a federal common law standard contend that the statute's broad remedial purpose requires that the Court liberally construe the term "operated" to impose "direct" liability on corporate parents. Specifically, they urge the Court to be swayed by the "remedial nature of CERCLA in support of [a federal common law-engendering] construction of the statute."[12/]

The Court should not accede to proponents' desire to cast aside the *O'Melveny* analysis in favor of a canon of statutory construction. The canon of interpretation affording a remedial statute's broad construction does not surmount the judicial doctrine limiting the development of federal rules of decision to certain situations. *Cf. United States v. An Article*

[12/] U.S. Br. at 26 (citation omitted) (arguing that by "look[ing] to the provisions of the whole law, and to its object and policy," the Court can deduce the meaning of the term "operated"); *see also* Amici States Br. at 15 (citing circuit court decisions that identify statute's remedial nature as a basis for construing the term "operated" to impose direct liability); and MDEQ Br. at 17-18 (citing *Dennis v. Higgins*, 498 U.S. 439 (1991), and circuit courts that have embraced this approach).

of Drug, Etc., 394 U.S. 784, 800 (1969) (courts must strike a balance between extending scope of remedial statute beyond the point where the legislature intended and narrowing its coverage short of what was intended); Antonin Scalia, *Assorted Canards of Contemporary Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1989) (the effort, with respect to any statute, should be neither liberally to expand nor strictly to construe its meaning, but rather to get the meaning precisely right"). Abandoning the principled analysis put forth in *O'Melveny* would be particularly unwise in the CERCLA context, mindful of the caution articulated by the Third Circuit in *Tippins* concerning "reliance upon general canons of statutory construction" to interpret the provisions of Superfund. *Tippins*, 37 F.3d at 94. Furthermore, proponents of a federal rule of decision would conveniently ignore principles articulated by the Court in interpreting statutes that are claimed to alter established common law. *Kamen*, 500 U.S. at 98; *Norfolk Redevelopment and Hous. Auth.*, 464 U.S. at 35-36; and *Shaw*, 101 U.S. at 565.

The Court has clearly described its analytical framework for determining whether to adopt a federal common law standard. The analysis requires identification of a federal interest or policy in significant conflict with use of state common law. Proponents of a federal common law standard rely to their detriment on canons of statutory construction while failing to address the governing analytical framework.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,
v.
CPC INTERNATIONAL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF AMICI *

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees. The Chamber regularly advocates the interests of its members in courts throughout the country on issues of national concern to the business community.

SUMMARY OF ARGUMENT

It is a fundamental principle of state corporate law that shareholders—including corporate shareholders—are insulated from liability for acts attributable to the corporations they own. Under state law, shareholders do not lose that insulation from liability simply because they actively participate in and exercise control over those corporations. Point I.

There is no statutory basis for the Government's argument that because CERCLA is a remedial statute, it should

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* Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief *amici curiae* and their letters of consent have been filed with the Clerk of the Court.

be construed to supplant state law and to impose retroactive liability on corporate shareholders whenever they "actively participate in and exercise control over" their subsidiaries, in order to permit the Government to enlarge the pool of "persons" liable to pay cleanup costs. U.S. Br. at I (Question Presented). Congress expressly defined the "persons" who are subject to CERCLA, and Congress's definition does not include "shareholders" of covered persons. 42 U.S.C. § 9601(21). And the Government's argument that Congress "plainly" intended to impose liability on *some* shareholders—those who exercise "too much" control—but not on others, finds even less support in the statutory text. Moreover, because corporate shareholders commonly participate in and exercise control over their subsidiaries, the Government's "participation and control" test would subject most parent corporations to liability under CERCLA. If Congress had intended for parent corporations to be liable for the operations of subsidiaries the parents controlled, it could easily have said so. But it did not. To the contrary, Congress's definition of the word "operator" does not by its plain meaning include an entity that "controls" another operator. Congress's definition plainly distinguishes between "operating" a covered facility and "controlling activities" at a facility, and makes clear that the latter is insufficient to establish liability under CERCLA. 42 U.S.C. § 9601(20)(A). Point II.

Moreover, the Government's proposed "participation and control" test would require this Court to find that Congress intended to ignore the extensive and well-established body of state corporate law, and to disrupt, *retroactively*, deeply embedded business expectations reasonably based on that body of law, by substituting a new federal common law for determining when a corporate "shareholder" is liable for acts attributable to a subsidiary it controlled. However, absent clear intent to the contrary,

and here there is none, Congress is presumed to have legislated against the backdrop of state law. Point III.

ARGUMENT

The Government's basic contention is that Congress intended to impose CERCLA liability, as "operators," on companies or individuals who owned stock in a corporation operating a covered facility and who exercised some unspecified degree of control over that corporation. Such a rule would completely undermine the basic principle of corporate law that shareholders are insulated from liability for the actions of the corporation they own. Shareholders frequently exercise control over the policies and conduct of corporations in which they have controlling interests, by electing a board of directors in which they vest the power and responsibility to conduct corporate affairs. When the shareholders are themselves corporations, those parent corporations often have directors or officers in common with their subsidiaries. Under state corporate law, the acts of those common directors and officers, when conducting the affairs of the subsidiary, are presumed to be on behalf of, and the responsibility of, the subsidiary and its board, *not* the shareholder parent. In certain cases, where the corporate form is abused and the distinction between the shareholder and the corporation is a sham, state law "pierces the corporate veil." But where the standards for piercing the veil have not been met, it is inconsistent with the very idea of a "corporation" to treat a corporation and a controlling shareholder as having jointly engaged in an activity—such as operating a facility—where the shareholder's only act was to control the corporation. As we show, there is no basis for concluding that Congress intended for courts to ignore that settled body of state law and to substitute an amorphous federal common law under which, in the vast majority of cases, subsidiaries that are operating facilities would be

treated as mere "agents" of their controlling shareholders, not as legally separate entities.

I. STATE CORPORATE LAW HAS ESTABLISHED SETTLED RULES FOR DETERMINING WHEN A CORPORATION'S SHAREHOLDERS ARE LIABLE FOR THE CORPORATION'S ACTIVITIES, AND THE GOVERNMENT'S PROPOSED TEST TRAMMELS THOSE RULES

CERCLA expressly provides that a "person" who "operated" a covered facility is liable, and that a "person" may be a "corporation." 42 U.S.C. §§ 9607(a)(2), and 9601(20), (21). Accordingly, courts have properly found corporations liable when they themselves were the "operators" of facilities.[1] The issue here is whether, in addition to such corporate "operators," Congress intended to hold liable their *shareholders* (whether corporations or individuals) whenever the shareholders "actively participated in, and exercised control over, the operations of [the] subsidiary," U.S. Br. at I (Question Presented), or "actively participate[d] in, and exercise[d] control over, the operations of [the] subsidiary's *facility*," U.S. Br. at 17 (emphasis added).[2] In arguing that this was Congress's intent, the Government totally ignores the well-established

[1] Here, and in the typical case, the *subsidiary* corporation was properly found to be the operator of the covered facility.

[2] Although these are the principal variants of the Government's proposed test, it also offers several other inconsistent formulations. *See, e.g.*, U.S. Br. at 8, 11 (exercising control over the subsidiary's "business"), 15 (participation in and control over "day-to-day management of the subsidiary's business"), 23 ("participat[es] in the management of a facility"), 25 ("exercises managerial or decision-making control"). The Government's inability to articulate and rely on a single test is itself powerful evidence that the Government's test does not flow "plainly" from the statutory language. *See* Point II.

body of state corporate law limiting the liability of corporate shareholders.

A. State Corporate Law Limits the Liability of Shareholders, Including Corporate Shareholders, for Acts That Are Ostensibly by and on Behalf of the Corporations They Own, Even When the Shareholders Actively Participated in and Exercised Control Over the Activities of Those Corporations

The most basic and uniform premise of state corporate law is that the corporation is not the "agent" of its shareholder owners, but a distinct and separate entity. The corollary of this premise is the principle of limited liability—shareholders are not liable for their corporation's acts. *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960); Harry G. Henn & John R. Alexander, *Laws of Corporations* §§ 73, 146 (3d ed. 1983); Wm. Meade Fletcher et al., 1 Fletcher Cyclopedia of the Law of Private Corporations § 25 (1997 Supp.). This same principle extends to *corporate* shareholders who own subsidiary corporations. The law treats the corporate parent just as it would any other shareholder, and extends to it the same limited liability the law extends to *any* shareholder. Wm. Meade Fletcher et al., 10 Fletcher Cyclopedia of the Law of Private Corporations § 4878 (1993); Wm. Meade Fletcher et al., 13 Fletcher Cyclopedia of the Law of Private Corporations § 6222 (1995); 18A Am. Jur. 2d Corporations § 856 (1985); *Grease Monkey Int'l, Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo. Ct. App. 1995); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988) (New York law).

Limited liability creates a strong presumption that the parent is not liable for acts that are ostensibly by and on behalf of a subsidiary. *NLRB*, 361 U.S. at 402-03 ("insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception"); 1 Fletcher Cyclopedia § 43 (1990); *Grease Monkey*, 916 S.W.2d

at 262. Under state law, this presumption is overcome only where the subsidiary does not have an independent will of its own and becomes what the law often refers to as the mere "alter ego" or "instrumentality" of the parent company.[3] Ownership alone, even 100 percent ownership, is not sufficient to pierce the corporate veil.[4] Thus, courts only "pierce the veil" and treat the two separate legal entities of parent and subsidiary as one entity where they are, in fact, operating as one—that is, where the subsidiary is a mere "front" for the parent, without an independent will or mind of its own. *Miles v. AT&T*, 703 F.2d 193, 195 (5th Cir. 1983) (Texas law); *see also Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1388-90 (7th Cir. 1994) (Illinois law); 1 Fletcher Cyclopedia § 43 (1990) (listing cases).[5]

[3] 1 Fletcher Cyclopedia § 43 (1990); *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1220 (10th Cir.) (Colorado law), *cert. denied*, 118 S. Ct. 55 (1997); *American Protein*, 844 F.2d at 60 (New York law); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (state and federal common law); *TNS Holdings, Inc. v. MKI Sec. Corp.*, 663 N.Y.S.2d 144, 146 (N.Y. App. Div. 1997); *Villanueva v. Astroworld, Inc.*, 866 S.W.2d 690, 695 (Tex. Ct. App. 1993).

[4] *Jon-T Chems.*, 768 F.2d at 691; *Miles v. AT&T*, 703 F.2d 193, 195 (5th Cir. 1983) (Texas law); *Edwards Co. Inc. v. Monogram Indus.*, 730 F.2d 977, 986 (5th Cir. 1984) (en banc).

[5] Often courts also require an additional showing that failure to hold the parent liable would promote an injustice or fraud. 1 Fletcher Cyclopedia § 43.10 (1990); *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 775 (Ga. 1996); *Hystro Prods.*, 18 F.3d 1384 (Illinois law); *Jon-T Chems.*, 768 F.2d at 692-93 (Texas law requires additional showing of fraud in contract actions, but not in tort lawsuits); *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 596 P.2d 227, 229 (Nev. 1979). A number of cases also require an additional element of causation, thus applying a three-part test: (1) mere alter ego; (2) improper or fraudulent purpose; and (3) causation between the improper purpose and the injury. 1 Fletcher Cyclopedia §§ 43, 43.10 (1990). There are thus several formulations of the veil piercing test, but they all ask whether the parent and subsidiary were in reality one entity.

Parent corporations routinely participate in and control the activities of their subsidiaries. That is common practice among the corporate members of NAM and the Chamber, and is the norm throughout the country.[6] "In reality, in the normal course of operations a corporate parent will have both an ownership interest in the subsidiary and effective control over the management and operations of the subsidiary."[7] But that is not sufficient to eradicate the distinction between the two separate legal entities of parent and subsidiary. 1 Fletcher Cyclopedia § 25 (1997 Supp.); *id.*, § 43 (1990); Henn & Alexander, *supra* §§ 148, 207; William O. Douglas and Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 196 (1929-30). If it were, nearly every subsidiary would be an alter ego of its parent. *See Jon-T Chems.*, 768 F.2d at 691.

The Government is flat wrong when it contends that it is atypical for a parent and subsidiary to share officers. *See* U.S. Br. at 44. A common incident of ownership frequently present in the parent/subsidiary relationship is identical or overlapping corporate officers and directors.[8]

[6] Fletcher Cyclopedia § 43.10 (1990) ("domination is a factor that will always be present in parent-subsidiary relationships"); *American Protein*, 844 F.2d at 60 (New York law).

[7] Richard G. Dennis, "Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law," 36 Vill. L. Rev. 1367, 1436 (1991).

[8] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89, 111 (1985) (noting that it "often will be the case" that "managers of subsidiaries . . . are also managers of the parent"). *See also* 18A Am. Jr. 2d Corporations § 857; Henn & Alexander, *supra* § 148; *American Protein*, 844 F.2d at 57 (New York law) ("it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary"); *Miles*, 703 F.2d at 195 (Texas law); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963); *Ciprotti v. United Inns, Inc.*, 433 S.E.2d at 585, 587

Again, that is a common practice among the corporate members of NAM and the Chamber. Courts uniformly have found that this factor alone does not "justify treatment of the two [legal entities] as one business unit." *Miles*, 703 F.2d at 195. Nor do communications between the two distinct legal entities signify any atypical relationship. The Government's proposed test would wrongly attribute to the shareholder parent any act taken by a director or officer of a subsidiary who is also a director or officer of the parent.[9] But state law recognizes and presumes that overlapping directors and officers "can change hats and represent the two corporations separately, despite their common ownership." *Jon-T Chems.*, 768 F.2d at 691; *see also* Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. at 196-97. Thus, an officer or director acts *for the subsidiary* when conducting the subsidiary's business, including communicating with the parent, and those acts do not transfer to the parent the liability and responsibility of the subsidiary board for conducting the subsidiary's corporate affairs. That is the rule unless there is strong evidence that the individual was acting *only* in his or her capacity as an officer or director of the parent, or the acts are actually contrary to the interests of the subsidiary.[10] It is only where other factors are present that the parent and subsidiary are held to be one entity rather than two.[11]

(Ga. Ct. App. 1993); *Korson v. Independence Mall I, Ltd.*, 593 So.2d 981, 984-85 (La. Ct. App. 1992); *Total Care Health Indus. v. Department of Soc. Serv.*, 535 N.Y.S.2d 15, 17 (N.Y. App. Div. 1988).

[9] Worse, the Government attributes the *same* acts to *both* the subsidiary and parent in order to make both liable as operators.

[10] *See, e.g., Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997); *Jon-T Chems.*, 768 F.2d at 691; *Edwards Co. v. Monogram Indus., Inc.*, 730 F.2d at 985-86; *Fisser v. International Bank*, 282 F.2d 231, 238 (2d Cir. 1960).

[11] Although ownership and shared officers and directors can be *relevant* factors under state veil piercing doctrine, they are not

B. The Government's Proposed Test Ignores and Would Completely Undermine State-Law Norms of Corporate Liability, Effectively Converting Subsidiaries Into the Parents' Agents

Contrary to the norms of state corporate law, the Government contends that the parent should be *directly* liable when it "actively participated in, and exercised control over, the operations of a subsidiary." U.S. Br. at I. In its only concrete example, the Government argues that "[i]f the parent corporation . . . employs *its own agents* as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, 'operating' the subsidiary's facility" and should be held directly liable. U.S. Br. at 44 (emphasis added). Thus, even though the fact of identical or overlapping board members or officers would be insufficient under state corporate law to disregard the subsidiary's status as a distinct legal entity, under the Government's expansive test, that fact alone would expose

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dispositive, as they would appear to be under the Government's proposed test. *Compare* U.S. Br. at 44 *with* 1 Fletcher Cyclopedia § 43.20 (1990); *Jon-T Chems.*, 768 F.2d at 691-92; *Steven*, 324 F.2d at 161. Instead, other factors must be examined to determine if the separate corporate identity of the subsidiary is really a sham, including whether: (1) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings; (2) the subsidiary operates with grossly inadequate capital; (3) the parent and subsidiary file consolidated financial statements and tax returns; (4) the parent uses the subsidiary's property as its own; (5) the subsidiary receives no business except that given to it by the parent; (6) the parent and subsidiary have common business departments; and (7) the daily operations of the two corporations are not kept separate. 1 Fletcher § 43 (1990); *see also Jon-T Chems.*, 768 F.2d at 691-92; *Steven*, 324 F.2d at 161. These factors are not exhaustive. Each court looks at the totality of the circumstances to determine whether the subsidiary and parent are not, in fact, two separate entities. *Id.*

many parent corporations to liability under CERCLA as "operators."

The Government's test treats a subsidiary's directors and officers as the *agents* of the subsidiary's *shareholders*. This is a dramatic break with state corporate law principles. Board members are not agents of the shareholders who elect them. Henn & Alexander, *supra* § 207 ("Although elected by the shareholders and removable by them for cause and possibly without cause, the directors are *not the agents* of the shareholders") (emphasis added). Nor are officers of a corporation the agents of that corporation's parent; they act with delegated authority from the *subsidiary* corporation's Board—on behalf of the subsidiary. *See* Wm. Meade Fletcher et al., 2 Fletcher Cyclopedia of the Law of Private Corporations § 505 (1990); Henn & Alexander, *supra* § 219. And the subsidiary corporation is not the agent of its parent or the parent's shareholders, regardless of the fact that it ultimately functions in their interests, as subsidiaries are appropriately expected to do.[12] To hold otherwise would be contrary to the most fundamental principle of corporate law—separation between owner and corporation.

The flaw in the Government's "agency" argument is highlighted in the context of a subsidiary corporation not wholly owned by another corporation. If, for example, corporation A owns 75% of a subsidiary, and corporation B owns 25% and an officer of A serves also as an officer of the subsidiary, his actions for the subsidiary cannot be regarded as the actions of corporation A. When he acts for the subsidiary, the officer has an obligation to serve the interests of the subsidiary. He could not be an agent of shareholder A without violating the fiduciary obligations he owes to the subsidary and, ultimately, to shareholder B.

[12] The subsidiary is only treated as the agent of the parent corporation where state law veil piercing is appropriate. *See* Frederick J. Powell, *Parent and Subsidiary Corporations* §§ 21-22 (1931).

C. The Government's Proposed Test Would Disrupt the Settled Expectations of Participants in the Marketplace.

As this Court has recognized, "[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979). Settled rules are particularly important in the commercial context, because they encourage settled expectations and thereby "foster investment by businesses and individuals." *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992). *See Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (basic features of corporations "such as limited liability . . . enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments"). *See also* Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89, 90-95 (1985) (purpose of limited liability rule is to encourage investment and credit which in turn spur economic growth).[13]

Adoption of the Government's proposed test would unquestionably disrupt the settled expectations of participants in the marketplace. "[A] stockholder who has invested in a corporation prior to the advent of the new [Government test], believing that his liability would be limited except [when the corporate veil can be pierced], now would find himself potentially personally liable under the CERCLA rules simply by virtue of his participation in the management of the corporation. He would not have contemplated or evaluated potential liability of this nature prior to in-

[13] The law has developed these limited liability principles to advance the economic interests of society as a whole. When individuals choose to incorporate, they obtain the benefits of limited liability. But their corporations must then pay separate taxes and comply with extensive regulations and requirements that are applicable only to corporations.

vesting in the corporation." Richard G. Dennis, Liability of Officers, Directors and Stockholders Under CERCLA: the Case for Adopting State Law, 36 Vill. L. Rev. 1367, 1506 (1991). Put simply, the Government's proposed test, particularly given its vagueness and breadth, "will thwart the ability of a stockholder to evaluate the risk before investing." *Id.*

Moreover, the disruption of settled expectations and impairment of rational business planning that would result from adoption of the Government's test is not limited to shareholders. That test would significantly impact those who contract with shareholders. For example, those who lend to parent corporations would have to assess the risk of parental liability based on the Government's amorphous test; insurance companies would have to attempt to ascertain the potential exposure of parent corporations for their subsidiaries' operations. In the past these third parties have been able to look to well-established state law to govern the potential liability of the parent corporation or stockholder; that law allowed them to focus on the parent's own activities on its own behalf (absent evidence sufficient to pierce the corporate veil). Further, under the Government's test, these lenders and insurers would have to consider not only environmental damage attributable to the parents' activities, but also damage attributable to their subsidiaries, since under CERCLA, if a parent is liable at all, it is potentially liable for *all* cleanup costs. "Thus, the commercial relationships predicated on traditional state piercing the corporate veil and direct liability laws would be disrupted on an ongoing basis." *Id.* at 1510. *See also id.* at 1511 ("Anyone working for, investing in or extending credit to a corporation (or to a corporation's officers, directors or stockholders) will certainly have a substantial body of expectations concerning the law of liability, based on long traditions and precedent.").

The disruption to settled commercial expectations is exacerbated by the fact that CERCLA not only imposes strict liability (thereby creating potential exposure to

literally billions of dollars of damages), but also has been interpreted to impose *retroactive* liability.[14] Thus, under the Government's test, parent corporations and stockholders could be held liable for actions taken by their subsidiaries decades ago, based on their participation in the subsidiaries' activities decades ago; indeed, the subsidiaries' actions may have been completely legal at the time, and may have been encouraged, or even *required*, by state or federal regulation. At the time the actions were engaged in, the parties reasonably relied upon settled state law principles of limited liability, and those principles encouraged and fostered the commercial endeavor. Accordingly, although the constitutionality of retroactive application of CERCLA is not presently before the Court, the statute's sweeping impact counsels against adoption of the Government's invitation to expand the scope of retroactive application further than can be justified by the text of CERCLA.

II. CERCLA CANNOT FAIRLY BE READ TO IMPOSE LIABILITY ON A SHAREHOLDER CORPORATION AS AN "OPERATOR" OF A SUBSIDIARY CORPORATION'S FACILITY SIMPLY BECAUSE THE SHAREHOLDER ACTIVELY PARTICIPATED IN OR EXERCISED CONTROL OVER THE SUBSIDIARY, OR ITS FACILITY

If Congress had intended CERCLA to eliminate the limited liability that is a fundamental feature of corporate law, it surely would have said so. But it did not. The Government, however, seeks to reach that result by arguing that Congress's use of the term "operator" *itself* reflects a clear intent to reach all parties that functionally control companies that, in turn, are operating a facility. That argument ignores the crucial fact that we are dealing

[14] The retroactive application of CERCLA raises significant constitutional questions that have not been resolved by this Court. Expanding the scope of CERCLA as the Government proposes would greatly exacerbate those constitutional problems.

with facilities operated by *corporations*, and the parties the Government is seeking to hold liable are corporate *shareholders* who acted only to manage or control those corporations. If Congress had intended to reach such entities, one would expect to find some language in the statute expressly holding shareholders liable for the actions of corporate operators.[15] But no such language exists.[16]

A. Nothing in the Language of the Act Supports the Government's Position.

The Government's "plain meaning" argument is implausible on its face. It is hardly likely that Congress decided to enact a greatly watered-down version of traditional state-law veil piercing—under which all shareholders who exercised control over corporate operators would themselves be liable in a broad range of circumstances that would not justify liability under state law—and then decided to convey that preemptive message simply by using the term "operator" to describe a category of "persons" liable under CERCLA. If Congress had wanted to mandate such a rule, it would have said so in one of three places: the listing of "covered parties" in § 9607(a); the definition of "owner or operator" in § 9601(20)(A); or

[15] Congress has enacted legislation expressly making shareholders, parents and affiliated corporations liable for the acts of the corporations they own or are affiliated with when that was Congress's intent. *See, e.g.*, 15 U.S.C. § 31 ("owned, chartered, controlled, or operated"); 15 U.S.C. § 77o (those "who, by or through stock ownership, agency or otherwise . . . control"); 15 U.S.C. § 78t (those "who, directly or indirectly, control"); *see also* 29 U.S.C. §§ 203(r), 1301(b)(1); 15 U.S.C. § 24 (directors, officers and agents). Similarly, Congress could easily have imposed liability on persons who "directly or indirectly" operate a facility. But it did not.

[16] *All* of the examples contained in the statutory definition of "person" describe entities that would themselves be liable for *their* ownership or operation of a facility. There are no examples of "persons" who are included in the definition because of their affiliation or *relationship* with such a covered entity. That is particularly significant because 42 U.S.C. § 9601(21) says the term "person" "means" the listed entities, not that it "includes" them.

most naturally, in the definition of "person" in § 9601(21). *See Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) ("If Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so.") *None* of these provisions, however, gives the slightest indication that Congress wanted to reach controlling shareholders of corporate "operators."

Section 9607(a). Although 9607(a)(1) (referring to "*the* owner and operator") suggests that Congress made the common-sense assumption that ordinarily each facility would have only one operator, the Government finds significant the fact that in § 9607(a)(2), the statute uses disjunctive language—imposing liability on any person who at the time of disposal of any hazardous substance "owned *or* operated" a facility. U.S. Br. at 21. This word choice merely indicates that Congress intended to cover non-owner "operators." The evident purpose of separating ownership from operation was to ensure that an owner of title to a facility would not be the only liable party in a situation where the facility is operated by a separate lessee. But Congressional intent to impose liability on the operator as well as the owner does not mean, or even suggest, that Congress intended to impose liability on the operator and the controlling *shareholders* of that operator.

Section 9601(21). In § 9601(21), Congress provided that the "term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity" or various governmental entities. This definition provides no indication Congress intended to disregard the usual significance accorded to distinctions among corporate entities and between corporations and their shareholders, and to impose liability on the corporate *shareholders* of corporate operators. Moreover, this definition provides even less support for the Government's assertion that Congress "plainly" intended to impose liability on *some* shareholders—those who actively participate in or control the corporations in which they invest—but

not others. CERCLA contains *no* language suggesting that affiliation with or control over a corporate operator would be a basis for liability—let alone language providing guidance about what kinds of affiliation and control would suffice. This is another indication that Congress intended to respect the legally separate nature of "corporations" and their shareholders established by state law.[17]

Section 9601(20). The statute defines "operator" simply as "any *person* . . . *operating*" a facility. 42 U.S.C. § 9601(20)(A) (emphasis added). The Government extrapolates from dictionary definitions of "operate" to the conclusion that Congress intended to hold liable any entity exercising control over a company operating a facility. This so-called "plain meaning" interpretation is singularly unpersuasive. The term "operator" does not, in common parlance, include those who exercise *control* over operators. The "operator" of a car is the driver, not someone in the back seat giving advice or instructions, and the operator of an airplane is the pilot, not an air traffic controller. *See Massey v. City of New York*, 589 N.Y.S.2d 145, 147 (Sup. Ct. 1992) (school crossing guard who controlled vehicles within approaches to intersection did not "operate" a vehicle within meaning of state statute).[18]

[17] The definition of "person" parallels the definition used in other federal environmental statutes. *See* 33 U.S.C. § 1362(5) (Clean Water Act); 42 U.S.C. § 6903(15) (Resource Conservation and Recovery Act). And none of those statutes has been interpreted to expose (corporate or individual) shareholders of corporate actors to liability.

[18] The Government suggests that a company would be an operator of a business like a railway if it "'directs[s] the working of'" or "'manages'" the railway. U.S. Br. at 20 (quoting *Oxford English Dictionary* (2d ed. 1989)). But that is not the plain or natural meaning. To the contrary, this Court has held that the corporation that owns a railway "operates its own road," even if that corporation is owned and controlled by a parent corporation. *Pullman's Palace-Car Co. v. Missouri Pacific Ry. Co.*, 115 U.S. 587, 596 (1885); *see id.*, at 597 ("Practically [the parent] may control the [subsidiary], but the [subsidiary] alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs.").

For that reason, when Congress wanted to adopt a broader conception of "operator"—in the closely analogous context of imposing liability for black lung benefits—it did so expressly by defining the term to include one who "operates, *controls, or supervises*" a coal mine. 30 U.S.C. § 802(d) (emphasis added) (enacted in 1969 and substantively revised in 1977, just three years prior to passage of CERCLA). As Congress obviously recognized in passing that provision, controlling or supervising a facility would not be considered "operating" that facility, unless a statute expressly included such a broader definition. Here, by contrast, Congress not only avoided use of such broad language but drew an express distinction between "operating" and "controlling" *in the same paragraph*. In the special case of a facility conveyed for specified reasons to a unit of State or local government, the statute defines "owner or operator" as "any person who owned, operated, *or otherwise controlled activities at such facility* immediately beforehand." 42 U.S.C. § 9601(20)(A)(iii) (emphasis added). Under the Government's interpretation, however, this additional language would be redundant.[19] This portion of the definition is thus a strong indication that Congress did not equate "operation" with "control," and instead made a deliberate decision that exercising "control" was sufficient only in a narrow category of cases where a facility has been transferred to state or local government.[20]

[19] Of course, it is an "ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

[20] *See Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) ("No such 'control' test appears in subsection (ii), . . . and we will imply none."); Richard S. Farmer, "Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard," 19 J. Corp. L.

In sum, the plain language of the statute—far from mandating that a corporation and its controlling shareholder be deemed jointly liable for actions taken by the corporation—says nothing of the kind. Reduced to its essence, the Government's argument is that Congress relied on the courts to discern in its selection of the word "operator" a clear intent to impose liability not only on companies directly operating facilities, but also on their shareholders, if those shareholders exercise too much control. The word "operator" cannot bear the weight the Government's argument requires.

B. Neither of the Government's Other Arguments Justifies Treating Controlling Shareholders as "Operators"

The Government attempts to shore up its remarkably weak textual argument by drawing an analogy to the statutory treatment of lenders, and by arguing that its proposed test is consistent with the "statutory objectives." Neither argument has merit.

The Lender Liability Analogy. In § 9601(20), Congress dealt with the special problem presented by lenders who would ordinarily be liable as "owners" because they hold indicia of ownership to protect security interests in

769, 792 (1994) ("By not including a provision for direct controlling person liability in the previous liability provision, Congress manifested its intention not to impose direct liability on such persons or corporations."). Congress drew the same distinction between operation and control in the 1986 Superfund Amendments, which included a new definition of the term "facility": "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites *and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person)*." 42 U.S.C. § 11049(4) (emphasis added). This provision contemplates situations in which affiliated companies, such as a parent and a subsidiary, separately own adjacent buildings or equipment, and makes clear Congress's understanding that such buildings are *not* "operated by the *same* person" even where the parent "controls" the subsidiary. Here again is confirmation that "control," in the view of Congress, simply is not the same as "operation."

facilities. Congress exempted this category of owner from the automatic liability that would otherwise have attached, and then created an exception to the exemption if the lender "participat[ed] in the management of a . . . facility." 42 U.S.C. § 9601(20)(A)(iii), (E)(I)(i). The Government argues that "[b]y the same reasoning, a stockholder or parent corporation that 'participate[d] in the management' of a facility is potentially liable as an 'operator.'" U.S. Br. at 23.

This argument is flawed for two reasons. First, there is no parallel provision in the statute stating that shareholders of operators are liable if they "participated in the management" of the operator. The lender liability provisions show that Congress knew how to base liability on "participation" or "control" if it wanted to. But it did so only with respect to lenders with indicia of ownership.

Second, there is no basis for *assuming* that Congress intended for courts to use the criteria applied to exempt one category of "owners" (lenders with indicia of ownership of a facility) to define the situations in which a category of *non*-owners (shareholders of an operator) would be held liable as "operators." As the EPA itself noted in 1992, "[c]ourts considering the meaning of section [9601(20)(A)] have also made clear that 'participation in management' and 'operator' *do not have the same meaning.*" 57 Fed. Reg. 18,344, 18,359 (1992) (citing cases) (emphasis added).[21] The EPA noted that "facts showing operation of a facility will be sufficient to establish participation in management," *id.*, but impliedly recognized that the obverse is not true.[22]

[21] The EPA was commenting on the final rules that were later incorporated into the detailed statutory exemptions for lenders on which the Government here relies.

[22] In any event, the Government fails to recognize that the statutory standards applied to lenders require a much more substantial degree of "participation in management" than would be needed to hold shareholders liable under the Government's proposed test. The secured lender provisions define "participation in management" as (1) exercising "decisionmaking control" such that the lender "has undertaken responsibility for . . . hazardous substance handling or

Consistency With Statutory Objectives. The Government suggests that its proposed test is consistent with the goal of seeking payment from those "responsible" for problems caused by disposal of hazardous materials. U.S. Br. at 26. But actual responsibility simply is not the touchstone for liability under CERCLA. *See* Richard Stewart & Bradley Campbell, "Lessons from Parent Liability Under CERCLA," 6 Nat. Resources & Env't 7, 7-8 (ABA Section of Natural Resources Law 1992) (noting that the scope of liability under CERCLA cannot be justified by reference to traditional tort goals of compensation and deterrence and the goal of placing responsibility for clean-up on those responsible for the problem). CERCLA imposes strict liability on parties regardless of whether they were "responsible" for committing any act that was illegal at the time of the act—indeed, often regardless of whether they committed any *act* relating to hazardous substances. For example, an "owner" of a facility can be liable even if it was merely a lessor of the property,[23] and a generator

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disposal practices," or (2) controlling the "overall management" of a facility encompassing "day-to-day decisionmaking with respect to environmental compliance" or encompassing "all or substantially all of the operation functions . . . other than the function of environmental compliance." 42 U.S.C. § 9601(20)(F)(ii).

Indeed, the statute specifically provides that a lender would *not* become a participant in management by contractually mandating any form of "environmental compliance," *id.* § 9601(20)(F)(iv)(II), by monitoring the facility and enforcing compliance mandates, *id.* § 9601(20)(F)(iv)(III), (IV), or even by requiring a "response action or other lawful means of addressing the release or threatened release of a hazardous substance," *id.* § 9601(20)(F)(iv)(V). Under the Government's theory, by contrast, any or all of these kinds of participation in management by a *parent corporation* would make the parent an "operator" fully liable under the statute.

[23] 42 U.S.C. §§ 9607(a)(1), (b); *see Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 682 (4th Cir. 1995) (owner is liable even if third party was sole cause of release and owner exercised due care to guard against foreseeable acts and omissions of third party, if the third party caused the release in connection with a contractual relationship with the owner such as a lease), *cert. denied*, 116 S. Ct. 1318 (1996).

of hazardous waste that was delivered to a transporter is strictly liable for any dumping of the material, regardless of the circumstances. 42 U.S.C. §§ 9607(a)(3), (b). Accordingly, there is no reason to believe Congress intended the otherwise irrelevant factor of "responsibility" to be *dispositive* when deciding whether a "shareholder" should be held liable. Indeed in the context of a statute imposing liability *without* fault or moral responsibility, it would have been easy for Congress to have imposed liability on parent corporations of subsidiary corporations that were themselves liable as owners or operators, if Congress had wanted to impose liability on all parties that were affiliated with, or had the power to control or supervise, entities that would be liable as owners or operators. But it did not.[24]

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[24] Although this is a remedial statute, Congress obviously did not intend to impose liability on every entity that had ever had anything to do with ownership or operation of a covered facility. For example, although the *current* "owner and operator" of such facilities is always liable, a *previous* "owner or operator" of a facility is *not* liable unless hazardous substances were disposed of during his period of ownership or operation. 42 U.S.C. §§ 9607(a)(1), (2). Under this statutory scheme, if corporation A owned and operated a facility which disposed of hazardous substances between 1840 and 1940, and corporation B owned and operated the same facility from 1940 until immediately before passage of CERCLA, and corporation C owned and operated the same facility from that point until enactment, and neither B nor C disposed of any hazardous substances, under CERCLA corporations A and C would be strictly and jointly and severally liable for all costs of cleaning up the hazardous substances disposed of between 1840 and 1940, but corporation B would not be liable at all. Obviously, if Congress *had* wanted to impose liability on as many deep pockets as possible, it could have imposed liability not only on current owner/operators, who might have owned and operated for only a few weeks, but also on previous owner/operators, who might have owned and operated for decades. But it did not. Thus, CERCLA cannot be interpreted simply by construing its provisions to cast the broadest net possible, because that was obviously not Congress's objective. *See generally Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986) (cannot invoke "plain purpose" of statute at expense of terms of the statute itself; even if Congress unanimously agrees to

It makes even less sense for the Government to theorize that Congress intended to draw a line imposing liability on *some* corporate parents based on their degree of involvement in the management of a subsidiary operator. Why would Congress have invited such a fact-intensive inquiry to decide whether particular shareholders should be liable?[26]

Nor does the Government explain why Congress would have wanted to enact a special rule of liability for shareholders of corporate *operators* without doing so with respect to shareholders of corporate *owners*. Short of piercing the corporate veil, the Government would presumably concede that in a case where a corporation is liable solely as an owner—because it owned title to a facility but did not conduct any of the operations—a parent of that corporation would not also be liable as an "owner" even if it actively exercised control over its subsidiary.[26] Yet it posits that Congress intended radically different treatment of shareholders of "operators," even though there is no language in the statute reflecting such intent.

Finally, the Government also suggests that its rule creates an "incentive" for parents to control the actions of their subsidiaries. But just the opposite is true. As the Sixth Circuit observed, under the Government's proposed test, "the threat of unlimited liability will likely deter

remedial purpose, differences in how to effectuate are often reflected in compromise final language).

[26] This amorphous test would embroil the federal courts in extensive litigation and would consume enormous societal resources. Congress has expressed concern over the amount of monies expended on litigation regarding who is liable for cleanups, rather than on performing the cleanups themselves. *See, e.g.*, H.R. Rep. No. 582, 103d Cong., 2d Sess. 100 (1994).

[26] *See Amcast Indust. Corp. v. Detrex Corp.*, No. 588-620, 1990 U.S. Dist. LEXIS 15191 at *8 (N.D. Ind. 1990) (refusing to hold former stockholders of corporation liable as "owners" of facility with respect to property actually owned by corporation, reasoning that nothing in CERCLA "even remotely suggests a Congressional intent to abrogate the common law of corporations by subjecting stockholders to liability as the 'owners' of corporate property").

private sector participation in the cleanup of existing sites." Pet. App. 14a. Under the Government's proposed test, a parent corporation that does *nothing* to control its subsidiary—and sits idly by while the subsidiary improperly dumps hazardous materials—would not be held liable. *See* U.S. Br. at 31 n.17 (expressly rejecting the Fourth Circuit's test imposing liability by virtue of a party's *authority* to control a facility). It is only when the parent becomes involved in management of the operations of the subsidiary that it risks liability under the Government's vague and expansive definition of the term "operator."[27] Here again, it is implausible to suppose that Congress—having decided *not* to impose liability on all parents simply by virtue of their power to control subsidiaries—nevertheless chose to hold liable a subcategory of parents that actually exercised such control.

III. THE COURT SHOULD REJECT THE GOVERNMENT'S INVITATION TO SUBSTITUTE A NEW FEDERAL COMMON LAW FOR DETERMINING SHAREHOLDER LIABILITY IN PLACE OF THE WELL-ESTABLISHED BODY OF STATE COMMON LAW.

Because the "participation and control" test the Government advocates has no foundation in the statutory language, the Government is, in effect, urging the creation of a body of federal common law to determine when a corporation's *shareholder* is liable under CERCLA for the corporation's operation of a facility. But the Government cannot even articulate what the test is. Instead, the Government proposes a vague standard that must be worked out by the courts by applying unspecified factors, in an unguided fashion, on a case-by-case basis. *See, e.g.*, U.S. Br. at 44 n.32 (acknowledging "inherently fact-based"

[27] Under the Government's test, a parent could be held liable because it was involved in operations of a facility unrelated to any discharge of hazardous materials. Moreover, a parent would be liable if it became involved with the subsidiary's discharges of hazardous materials solely for the purpose of developing an alternative system that was *not* environmentally damaging. Liability in that circumstance would *disserve* CERCLA's goals.

nature of the inquiry and lising "some" of the relevant factors); n.2 *supra*.[28] There is no basis for adopting this nebulous federal common lav test in place of the well-established body of state common law that has been used for decades to determine when it is appropriate to look beyond the corporate actor to the (individual or corporate) shareholder for liability purposes.

Given that Congress did not "speak directly to the question" of the liability of a corporation's shareholders for operations by and on behalf of the corporation, CERCLA must be presumed to "favor[] the retention of long-established and familiar principles" of limited liability under state law. *United States v. Texas*, 507 U.S. 529, 534 (1983) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), illustrates this principle in an analogous context. In *O'Melveny*, this Court unanimously refused to substitute federal common-law for state corporate law. *O'Melveny* involved an action by the FDIC, as receiver for a failed savings and loan association, against that corporation's former legal counsel, alleging professional negligence and breach of fiduciary duty stemming from the lawyers' failure to inquire into the S&L's financial status. The law firm argued that, under state common law, the S&L officers' knowleige of corporate wrongdoing must be imputed to the corporation, and therefore the FDIC, standing in the shoes of the corporation as receiver, was estopped from suing the law firm. The FDIC urged the creation of federal common law for determining whether knowledge of corporate officers is imputed to the

[28] The Government assures the Court that "mere investors" or "interested investors" or investors who act in a manner "consistent with their investment relationship," or who exercise "mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship" would not be held liable as operators. U.S. Br. at 30, 35 n.21, 43 n.31. But the Government's assurances would not avoid the necessity for extensive litigation to decide when an investor is acting appropriately or consistently with its investment relationship.

corporation and to the FDIC when it sues as receiver of the corporation. The *O'Melveny* Court refused to "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." 512 U.S. at 85. The Court cautioned that creation of federal common law is proper only in "extraordinary cases." *Id.* at 89. Unless there is a "significant conflict with an identifiable federal policy or interest," state law governs. *Id.* at 88.[29] As in *O'Melveny*, "this is not one of those cases in which judicial creation of a special federal rule [is] justified." *Id.* at 87.

The Government argues that adherence to the limited liability norms that are the fundamental feature of state corporate law "would frustrate Congress's intent to provide a national solution to the nationwide public health and environmental problems resulting from hazardous waste disposal." U.S. Br. at 40. As this Court has explained, "[t]o invoke the concept of 'uniformity,' however, is not to prove its need." *Atherton v. FDIC*, 117 S. Ct. 666, 671 (1997). Nothing in the text or legislative history of CERCLA demands uniform liability standards, particularly in the context of shareholders' and parents' liability as operators.[30] In *O'Melveny*, the Court specifically re-

[29] Even in the context of federally chartered corporations, this Court has declined to create a federal body of corporate law, instead relying upon state corporation law. *See Atherton v. FDIC*, 117 S. Ct. 666, 669-76 (1997) (holding that state law, not federal common law, governs the standard of care owed by officers and directors to federal savings banks). Reliance on state law is even more appropriate in cases, such as this, involving state chartered corporations, which literally exist only because of state law.

[30] The Government cites the isolated comments of one legislator on the House Floor in support of its claim that Congress intended uniformity. *See* U.S. Br. at 40 n.27 (citing 126 Cong. Reg. 31,968-969 (remarks of Rep. Florio)). But the record reflects that Representative Florio was addressing specifically the quite different issue of joint and several liability, and he opined that CERCLA would encourage the development of federal common law "in this area." *Id. See also* 126 Cong. Rec. 31,965. There is no evidence that any

jected the argument that state law should be supplanted by federal common law in order to "facilitate . . . nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty." 512 U.S. at 88. The Court explained that acceptance of that argument would result in the courts being "awash in 'federal common-law.'" *Id.* *See also United States v. Kimbell Foods, Inc.*, 440 U.S. at 730 (rejecting "generalized pleas for uniformity").

Uniformity arguments are particularly inappropriate with regard to CERCLA, in which Congress contemplated and expressly sanctioned the continued operation of state law, thereby making uniform enforcement of liability impossible. For example, to secure repayment of costs, CERCLA establishes a lien in favor of the United States on real property subject to or affected by a CERCLA cleanup. 42 U.S.C. § 9607(l)(1). The priority of the lien against other creditors, however, is expressly governed by state law. *Id.* § 9607(1)(3). Congress also provided that state law may set the degree of cleanup that any federal remedial action of a hazardous substance must attain, if the state law is more stringent than federal law. *Id.* § 9621(d)(2)(A). In addition, Congress provided for the efficacy of private indemnity agreements, *id.* § 9607(e), which the courts have uniformly held are interpreted under state law. *E.g., Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212 (3d Cir. 1994).[31] This Court has recognized

other member of Congress shared even that view, and no evidence that Rep. Florio or any other member of Congress intended federal law to govern all aspects of CERCLA liability. Indeed, Congressman Florio referred to and inserted as part of his remarks an analysis by the U.S. Department of Justice, and that analysis cites *only* state law for the proposition that "common law provides for joint and several liability where the act or omission of two or more persons results in an indivisible injury." 126 Cong. Rec. at 31,966 (letter from Assistant Attorney General Alan Parker) (citing Prosser, the Restatement of Torts, and Indiana case law).

[31] In contrast, certain *contribution* issues under CERCLA are expressly governed by federal law. 42 U.S.C. § 9613(f) (claims

that where, as here, Congress enacts a statutory scheme that relies upon state law, any "assumption" that uniformity is necessary is foreclosed. *See Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 209 (1946).

Indeed, if resort to the legislative history were necessary, the legislative history strongly suggests that Congress intended for courts to rely on state common law when interpreting and enforcing CERCLA. There are no Senate or House reports on the bill that became CERCLA because it was a floor amendment offered one week before enactment. Accordingly, the floor statements of the bill's sponsors—Senators Stafford and Randolph—constitute the best indication of how Congress intended the statute to be interpreted. In discussing which persons would be liable under CERCLA for costs resulting from a "federally permitted release," Senator Randolph said: "The fund in recouping such costs, or any private damage actions, must rely on other law—*common law* or Federal or State statutory law—in lieu of the liability provisions of section 107 [42 U.S.C. § 9607]. The determination of exactly what liability standards, defenses, or other rules apply will be made on a case-by-case basis pursuant to regimes other than that of this bill." 126 Cong. Rec. 30,932 (emphasis added). Because "common law" normally means state common law, and Senator Randolph did not say "federal common law," and because he specified both federal and state "statutory law," the plain and natural meaning of this statement is that "liability standards" would be determined by statutes or by state common law. That meaning is confirmed by Senator Stafford, the co-sponsor, who told his colleagues that the bill was "*not* an embodiment of

regarding contribution shall be brought in accordance with Federal Rules of Civil Procedure and governing law shall be federal law). This Court has declined to interpret statutes including such express provisions as requiring federal uniformity in connection with other provisions, despite congressional silence regarding those other provisions. *See O'Melveny*, 512 U.S. at 79 (invoking "[i]nclusio unius, exclusio alterius").

other forms of no fault liability or innovative Federal intrusion into the law now developing *within individual State jurisdiction*." 126 Cong. Rec. 30,986 (emphasis added). *See also* 126 Cong. Rec. 30,984 (Stafford) (noting that "no obligations or liabilities of any person under other Federal or State law, including common law, are diminished by the provisions of [CERCLA]"). Thus, the legislative history, though sparse, strongly suggests that Congress did not intend to displace state law.

Moreover, reliance on state law would not conflict with or thwart CERCLA's purposes. The Government argues that adherence to state law "would thwart the fundamental policy expressed in CERCLA that those who are responsible for creating hazardous conditions, rather than the innocent public, should bear the costs of responding to those hazards." U.S. Br. at 41. First, as noted *supra*, pp. 20-21, CERCLA actually imposes liability without regard to fault or moral responsibility; owners and operators are liable even if they did *not* create the hazardous conditions, and they have been held liable even if their actions were legal at the time, or even mandated by state regulators. Moreover, an assertion that "responsible" parties should be liable simply begs the question of how one determines corporate responsibility in this context. There is no evidence or reason to believe that application of state corporation law would allow truly "responsible" parties to escape liability. The Government has not demonstrated that state veil-piercing law permits corporate parents to avoid liability when the distinction between the parent and its subsidiary is a sham, or creates "safe havens" for polluters. Indeed, there would be no incentive for States to shield culpable corporate entities from liability, because States have very substantial interests in protecting their citizens and state resources, and in remedying environmental contamination in their States. *See generally* MDEQ Br. at 1-2; Brief of Amici States at 1-2.

To the extent the Government is arguing that corporate shareholders should be held liable even when state law

would shield them from liability, in order to enlarge the pool of parties available to pay cleanup costs and to protect taxpayers from bearing the cost of hazardous waste cleanup, the *O'Melveny* Court expressly rejected such an argument for the creation of federal common law. Similar to the Government here, the FDIC argued in *O'Melveny* "that it would disserve the federal program to permit California to insulate the attorney's . . . malpractice, thereby imposing costs on the nation's taxpayers, rather than on the negligent wrongdoer." 512 U.S. at 88 (quoting FDIC's brief). The Court found that reasoning "positively probative of the dangers of [a] facile approach to federal-common-law-making." *Id.* To paraphrase the Court, "[b]y presuming to judge what constitutes [a parent corporation's being responsible], this argument demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id. See also United States v. Kimbell Foods, Inc.*, 440 U.S. at 737-38 (similarly rejecting "more money" arguments); *United States v. Yazell*, 382 U.S. 341, 348 (1966) (same).[32] In any event, CERCLA's scheme of both strict and joint and several liability ensures that in virtually all cases, private resources will pay for the cost of cleanup. And even where no private "responsible parties" are available, the Superfund—not the taxpayer—bears the cost.[33]

In sum, there is no basis for concluding that Congress intended to displace traditional state law rules of limited

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[32] A finding that application of state law would significantly conflict with the objectives of CERCLA requires more than a showing that the United States would lose particular law suits. *See Robertson v. Wegmann*, 436 U.S. 584, 593 (1978) (noting that otherwise "the appropriate rule would then always be the one favoring the [United States] and its source would be essentially irrelevant").

[33] The Superfund is funded principally by a tax on chemical, crude oil, and petroleum products and by a corporate environmental tax. *See* 26 U.S.C. §§ 59A, 4611, 4661, 9507(b).

liability, particularly the state law rules for determining when a parent corporation should be deemed liable for acts ostensibly by and on behalf of a subsidiary, in the context of determining which corporate entities should be deemed "operators" under CERCLA. And there is no reason to conclude that state law would significantly frustrate CERCLA's purposes. Accordingly, the presumptive and general rule should apply, and corporate liability issues not clearly governed by CERCLA should be resolved by reference to state law.

CONCLUSION

The judgment below should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.,

On Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE SUGGESTING AFFIRMANCE

AMERICAN FOREST & PAPER ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE,
GROCERY MANUFACTURERS OF AMERICA,
INSTITUTE OF SCRAP RECYCLING INDUSTRIES,
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INTEREST OF AMICUS CURIAE

The *amici* are a group of business associations and corporations which, either directly or through their members, are consistently involved with issues arising under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and with issues concerning the proper and legal structuring of corporations and other business forms. The *amici* have broad experience in the capital markets of the United States and deep understanding of the importance of the principles of limited liability at issue in this case.[1/]

SUMMARY OF THE ARGUMENT

The doctrine of limited liability was originally formulated in the 19th century by the state legislatures to implement *both* economic and democratic goals. It remains a fundamental part of the statutory law in all fifty states. In its original conception, limited liability was perceived as a means of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic. Limited liability reduces the potential costs and risks of buying shares, and thus encourages investment and capital formation. Limited liability also facilitates the development of public markets for securities, permits the allocation of risks or benefits between parties, and supports the certainty of planning necessary to those who have organized corporations. It is a fundamental background norm of the American legal system, and is a principle well-known to and understood by virtually all members of Congress.

In this case, the government ("Petitioner") argues that it is

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[1/] Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief. Other than the *amici*, only Browning-Ferris Industries, Inc. made any monetary contribution. Consents to file this brief have been received from all parties and filed with the Court.

appropriate and necessary to extend the reach of CERCLA liability in a manner contrary to these long-established principles. In acceding to this desire, some lower courts, however well-intentioned, have twisted the language of the statute and undermined two fundamental constitutional principles. First, Congress, not the courts, writes the law. And, in deference to our federal system, Congress must never be presumed silently to have displaced state law.

The language of the statute is straight-forward. Section 107(a)(2) of CERCLA makes liable persons who "owned or operated" hazardous waste sites. Section 101(20)(A)(ii) defines "owner or operator" as the "person owning or operating" such a location. There is no question in this case that CERCLA makes liable the subsidiary which actually conducted the operations at the site. The issue here is whether the definition of "operator" should be given an expanded interpretation to cover additional parties who were neither the titular owner or operator but who, according to Petitioner, should nonetheless be swept into the CERCLA "operator" liability net on the ground of having had "control" over the subsidiary's conduct.

There is no statutory language suggesting that the term "owning or operating" includes such broader concepts as mere "control" of a subsidiary. Indeed, other sections of the statute compel the conclusion that the "control" concept was purposely excluded from the pertinent definition of "owner or operator" by Congress. Congress acted against a long-standing backdrop of state laws limiting liability for shareholders. There is a presumption, having *constitutional* dimensions, that Congress incorporates these background norms into its enactments unless it explicitly states otherwise. But there is nothing in CERCLA or its legislative history to suggest that Congress intended these long-established state law principles to be displaced.

Recent decisions of this Court affirm that state law may only be supplanted by judicially-created federal common law in "extraordinary cases." *E.g., O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 89 (1994); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). There is nothing extraordinary about CERCLA that justifies the *ad hoc* displacement of traditional state law, nor are questions about when a shareholder should be held subject to its subsidiary's liabilities by any means unique.

Finally, the repeated creation of "federal common law" under CERCLA, displacing traditional state law standards, has affected the ability to allocate risks and benefits through use of limited liability forms, the conduct of asset transactions, the ability to dissolve corporations under state law, and even probate of decedents' estates. Absent a conflict with a significant federal interest such tampering is unwarranted.

ARGUMENT

I. CERCLA'S DEFINITION OF "OWNER OR OPERATOR" IS TO BE APPLIED IN LIGHT OF TRADITIONAL CORPORATION LAW

A. The Language Of The Statute And Its Legislative History Contain No Hint That Traditional Corporation Law Principles Should Not Apply

CERCLA § 107(a)(2) makes liable:

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of....

"Owner or operator" is defined in CERCLA § 101(20)(A):

> The term "owner or operator" means ... (ii) in the case of an onshore facility [like the one in this case] ... any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, *or otherwise controlled* activities at such facility immediately beforehand.

Thus, an "owner" is "any person owning" and an "operator" is "any person ... operating" the hazardous substance facility. The very circularity of the definitional language is most important guidance in answering the question before this Court — whether a parent is the "operator" of a facility which is actually both owned and operated by a subsidiary corporation.[2/]

Petitioner argues that Congress (albeit silently) intended to impose liability on a parent which "actively participates in and exercises control over" the subsidiary's facility and urges this Court to adopt that test. *E.g.*, Pet. Br. 17.[3/] No such intent is

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[2/] As the Seventh Circuit observed regarding this definition, *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988) (emphasis added):

> [t]his [definition] is circular.... The definition ... [therefore] must come from a source other than the text. The circularity strongly implies, however, that the statutory terms have their ordinary meanings *rather than unusual or technical meanings.*

[3/] To do so, Petitioner makes much of Congress' use of the word "or" to connect "owner or operator," arguing that this one word shows Congress acted "without regard" to a party's "formal corporate relationship to the site." Pet. Br. 21-22 (citing *U.S. v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991)). There is a simpler explanation for using the word "or": while often the same person both owns and operates the site, sometimes, as in the case of a landlord (the owner) and a tenant (the operator), ownership and operation are split. Section 107(a)(2) makes both liable — but the mere fact that the owner and the operator can be separate people does not support the much more dramatic proposition that Congress intended to supplant principles of limited liability.

revealed by the text of the statute or its legislative history. And only buried at the end of its brief is Petitioner's true test revealed: a parent corporation will be liable when it "steps beyond its role as a stockholder ... and actually participates in the day-to-day operation of a subsidiary." *Id.* at 41. *Factually*, Petitioner says its test will be satisfied by evidence showing that the parent has caused its own officers also to become active officers of the subsidiary, *id.* at 44, which is quite the usual course in American business.

Petitioner does not offer a single citation to the 1980 legislative record regarding this definition to support its claim about what Congress "intended." This is not surprising in light of the fact that CERCLA's legislative history does not offer the slightest suggestion that parent corporations should be liable for actions of a subsidiary when traditional veil-piercing law would not impose liability.[4/] Congress acted against a backdrop

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[4/] The CERCLA definition of "owner or operator" and the "security interest" exemption attached to it are traceable in the legislative history to separate provisions in the original Senate and House bills. The original Senate bill, S. 1480, provided that the term "owner or operator" "shall have the meaning provided in section 311(a) of the Clean Water Act." S. 1480, 96th Cong. § 2(1). Section 311(a)(6) of the Clean Water Act, 33 U.S.C. § 1321(a)(6), provided then (and now) that "owner or operator" means "(B) in the case of an onshore facility ... any person owning or operating such onshore facility...." This is the exact language now found in CERCLA § 101(20)(A)(ii). This same language was reported to the floor of the Senate, without any discussion of an intent to supplant limited liability, in the committee report. S. Rep. No. 96-848, 96th Cong., 2d Sess. (1980).

of traditional principles of corporations law and expressed no intent to depart from those principles.[5/]

B. When Congress Acts Against An Established Legal Background, Statutory Terms Incorporate That Background Unless Congress Otherwise Specifies

That Congress intended the words "owner" and "operator" to be given their usual meanings and understood in light of their long-established corporations law backdrop is evident in the very circularity of the definition. *See Edward Hines Lumber, supra*, 861 F.2d at 156. Congress did not expand

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The original House bill on this subject, H.R. 85, expressly exempted from its entirely different definition of "owner," — *not "operator"* — any person "who, without participating in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." H.R. 85, 96th Cong. § 101(x). This provision, aimed at protecting lenders in title theory states from "owner" liability *and wholly separated from the concept of "operator" liability*, is the source of the "security interest" exemption in CERCLA § 101(20)(A).

After these bills passed their respective chambers, various sections of the bills were merged without any Conference Report in a lame duck session after the 1980 elections (which changed control of the Senate). The final compromise version of CERCLA § 101(20)(A) used the Senate's incorporation of the Clean Water Act definition of "owner or operator," and appended to that Water Act definition the House's "security interest" exemption from "owner" liability.

[5/] Since CERCLA's definition of "owner or operator" was borrowed from the Clean Water Act, *supra* n.4, this Court may consider cases interpreting that statute. *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959). In the only case addressing parent-subsidiary liability under that Act, *United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt.), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974), the court applied a traditional veil piercing test.

upon the definition in order to provide other law to apply nor did it suggest in the legislative history that the words were to be applied in derogation of established corporations law concepts.

The simple meaning rule is especially applicable when, as here, Congress has not otherwise defined the statutory terms and those terms have a well-understood legal meaning. The "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986).[6/] Rejecting a suggestion that a new statute had changed judicially developed concepts of tort liability, for example, this Court held that:

> [t]he legislative history strongly counsels against [such an] interpretation of the statute, which modifies ... pre-existing rights.... The reports and debates ... contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating [what would be] an important and controversial change in existing law is unlikely. Moreover, the general statements appearing in the legislative history ... are inconsistent with what respondent argues was in the back of the legislators' minds about this specific issue.

[6/] *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) (Jackson, J.):

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word ... and the meaning its use will convey to the judicial mind unless otherwise instructed ... [A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Edmonds v. Campagnie Generale Transatlantique, 443 U.S. 256, 266 (1979).

1. Congress Knows How To Overcome The Corporate Form When It Intends To, And Did So In A Different Clause Of This Very Statute

The *en banc* Sixth Circuit in this case explicitly noted the difference between the definition in § 101(20)(A)(ii), which applies in this case — an "owner or operator" is "any person owning or operating" — and the definition in the very next clause of CERCLA, § 101(20)(A)(iii), which governs facilities conveyed to state or local governments. In the latter case an "owner or operator" is "any person who owned, operated, *or otherwise controlled*" the facility prior to such conveyance. As the Sixth Circuit stated, "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." *U.S. v. Cordova Chemical*, 113 F.3d at 579. *Accord Joslyn Mfg. Co. v. T.L. James & Company, Inc.*, 893 F.2d 80, 83 (5th Cir. 1990) ("No such 'control' test appears in subsection (ii), the subsection at issue in this case, and we will imply none."), *cert. denied*, 498 U.S. 1108 (1991).[7]

As the district court in the *Joslyn v. T.L. James* case found, the presumption that Congress intends its statutes to be read in light of the traditional rules of limited liability is bolstered by "the fact that Congress has, in the past, specified [when] shareholders or controlling parties are to be held responsible for the acts or debts of a valid corporation." 696 F. Supp. 222, 226 (W.D. La. 1988), *aff'd, supra*. That court identified four statutes where Congress had explicitly determined to override

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[7] *Cf. O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994) (quoting maxim *"Inclusio unius, exclusio alterius"*).

the corporate form or modify limited liability.[8] *Id.* There are many others.[9] To ignore the corporate form without explicit support in the text of the statute diminishes Congress' power to decide when limited liability principles should be overridden — a power exercised here only sparingly in the narrow case of CERCLA § 101(20)(A)(iii) facilities.[10]

Petitioner's second statutory interpretation argument — that the "security interest" exemption from the definition of *"owner"* in § 101(20)(A) aids in construing the term *"operator"* in § 101(20)(A)(ii) because it suggests that Congress intended to

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[8] *E.g.*, Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; Internal Revenue Code, 26 U.S.C. § 1239(a)(2), (3); Fair Labor Standards Act, 29 U.S.C. § 203(r); and Employee Retirement Income Security Act, 29 U.S.C. § 1301(b)(l).

[9] *E.g.*, National Bank Act § 12, 12 U.S.C. § 63, *repealed* P.L. 86-230 (double liability of bank shareholders); Securities Exchange Act of 1934, 15 U.S.C. § 78t (liability of "controlling persons"); Federal Aviation Act, 49 U.S.C. App. § 1301(31) (defining "operation of aircraft" to include any "person who causes or authorizes with or without the right of legal control...."; *see United States v. Midwestern Pouch Express, Inc.*, 662 F. Supp. 207, 211-12 (D.N.J. 1987) (specifically distinguishing limited liability principle on basis of this statutory language)).

[10] The conclusion that it was Congress' intent in CERCLA to impose liability on persons who "otherwise controlled" a facility *only* in the narrow instance of § 101(20)(A)(iii) is bolstered by comparison with the Clean Water Act, the source of the CERCLA definition. In the Water Act the third clause of the "owner or operator" definition imposes liability "in the case of an abandoned ... facility, [upon] the person who owned or operated such facility immediately prior to such abandonment." 33 U.S.C. § 1321(a)(6)(C). The Water Act does *not* impose liability upon those who "otherwise controlled" activities at those abandoned facilities, as does the CERCLA definition. The only possible conclusion is that Congress purposely adopted the broader "control" standard *only* for the case of CERCLA clause (iii) facilities conveyed to state or local governments.

reach anyone who "participates in the management" of a facility, Pet. Br. 22-23 & 25 — fails for two reasons. First, an exemption from "owner" liability for holders of security interests who "participate" says nothing about the meaning of "operator."[11/] Second, the argument founders on the shoals of clause (iii). The "security interest" exemption on which Petitioner relies applies to *all three* clauses of § 101(20)(A). If the word "operator" in these three clauses *already* includes those who "participate" or otherwise have "control" by virtue of gloss derived from the "security interest" exemption, then why did Congress need to use the words "or otherwise controlled activities" in order to broaden clause (iii)? Using the "security interest" exemption to construe the word "operator" to include a participation or control test makes the phrase "or otherwise controlled activities" in clause (iii) mere surplusage, which is a forbidden result. *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) ("[i]t is our duty 'to give effect, if possible, to every clause and word of a statute'").

2. *The Statute's Remedial Purpose Is Not A License To Ignore Historic Principles Of Corporation Law*

The Sixth Circuit properly refused "to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress." 113 F.3d at 579. But Petitioner and its *amici* contend that the "remedial" nature of CERCLA and its "objectives" dictate that limitations on liability be ignored, Pet. Br. at 26, *accord* Amici States Br. at 15-16, as if unstated congressional language could be divined simply because this is an environmental statute. "Remedial"

[11/] Even the case primarily relied upon by Petitioner, *U.S. v. Kayser-Roth, supra,* notes that the "security interest" exemption is only an "explicit limitation" on "owner liability." 910 F.2d at 26 n.6.

purpose alone cannot change the facts that Congress chose not to do what Petitioner desires this Court to do, and that courts construing remedial statutes cannot simply rewrite them to ignore long-standing principles of limited liability.[12/]

The powerful remedial purposes of the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981-1983, for example, have not empowered the courts to disregard traditional principles of limited liability, nor have courts felt compelled to do so when implementing such remedial statutes as the Employee Retirement Income Security Act, 29 U.S.C. § 1381, *et seq.*[13/]

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court refused to ignore the long-standing background principle of legislative immunity in interpreting § 1983. Noting congressional silence on the question, the Court held that it could not "believe that Congress ... would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." Fifteen years later, the Court ruled similarly regarding judicial immunity:

[12/] *Cf. Edward Hines Lumber,* 861 F.2d at 157 ("To the point that courts could achieve 'more' of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA ... do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices.").

[13/] Similar arguments have been rejected in cases arising under other remedial statutes. *E.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (Securities Act: "remedial purpose" not sufficient to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning"); *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686 (5th Cir. 1985) (applying usual veil piercing tests in False Claims Act case against parent of subsidiary convicted of stealing $2.53 million from the United States), *cert. denied,* 475 U.S. 1014 (1986).

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person".... The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities... [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Pierson v. Ray, 386 U.S. 547, 554-55 (1967). *Accord Owen v. City of Independence*, 445 U.S. 622, 637-39 (1980) (applying common law rules of corporation liability to municipal corporation liability under § 1983).

These principles have also long been applied to business entity liability questions arising under the Civil Rights Acts. In *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975), the court held that traditional corporation law rules should apply to the liability *vel non* of corporate directors who violate §§ 1981 and 1982. Discussing *Tenney* and *Pierson, supra*, the court held:

> [i]n short, the Court interpreted § 1983 as neither enlarging nor diminishing traditional immunities of public officials. Comparably, §§ 1981 and 1982 should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation.

Tillman, 517 F.2d at 1143-44.[14]

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[14] Similarly, in *Spears v. Transcontinental Bus System, Inc.*, 226 F.2d 94, 97 (9th Cir. 1955), *cert. denied*, 350 U.S. 950 (1956), the court applied traditional veil piercing theories and refused to find a parent corporation liable for the civil rights violations of its subsidiary. *See also Berger v. Iron*

Cases under ERISA, too — another remedial statute designed to protect a government fund from costly corporate defaults — have rejected attempts to impose liability upon shareholders without regard to the corporate form. *E.g., DeBrecini v. Graf Bros. Leasing, Inc.*, 828 F.2d 877 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988). There, the fund trustee argued that the undefined term "employer" should be construed in light of "economic reality" to reach the shareholder because the latter maintained "virtually complete control of the day to day operations" of the corporation. *Id.* at 879. The court "beg[a]n with the observation that the principle of limited liability is a cornerstone of corporate law." *Id.*

> We have [here] a statute that, on its face, does nothing to alter the principle of limited liability, but that appellant urges us should nevertheless be read to do so... [T]he principle of limited liability for corporate debts is longstanding enough and important enough to be considered a background norm, against which Congress may act of course, but which is controlling in the absence of such action... The way that one could have expected Congress to make such an intention felt was through a definition of the word "employer." Yet Congress did not define the word....

Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1428 (D.C. Cir. 1988) (rejecting argument that "special standards" should apply under § 1981: "where Congress has not otherwise declared the standards ..., a union's liability for the acts of another is to be determined under common-law agency principles.... [W]e think that if Congress intended that international unions be held liable for the failings of their locals with regard to civil rights under a special standard, it would have given some indication to that effect), *on reh.*, 852 F.2d 619, 621 ("distinct juridical personality of an entity is not a legal nicety").

Id. at 880.[15]

3. Petitioner's Argument Goes Beyond the Bounds of Statutory Interpretation

In essence, Petitioner very artfully argues that its proposed test of parent corporation operator liability is merely a matter of statutory construction of the alleged "ordinary meaning" of the definition of "owner or operator." *E.g.*, Pet. Br. 17. "But," as this Court has observed, "the authority to construe a statute is fundamentally different from the authority to fashion a new rule ... which Congress has decided not to adopt." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981). *See also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642-47 (1981). Petitioner's proposed test crosses well over the line where statutory construction becomes the fashioning of a new federal common law rule.

The principle of limited liability is a background norm, against which Congress may, of course, act, but which is controlling in the absence of such action. *E.g., Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has [not] indicated that the entire corpus of state corporation law is to be replaced...."). Moreover, there is *nothing* in CERCLA or its legislative history to suggest that Congress contemplated that its definition of "owner or operator" would result in the dilution of the principle of limited shareholder liability. In such a situation — the

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[15] *Accord Connors v. P & M Coal Co.*, 801 F.2d 1373, 1376-77 (D.C. Cir. 1986) ("nothing in either the language or purpose of MPPAA to justify so significant a compromise of the ... principle of limited liability, nothing to suggest that Congress intended to subject owner-operators of a closely held corporation to personal liability merely because they actively participated in running the business. Acceptance of the district court's 'interest and control' test would ... subvert the major purpose of incorporation....").

existence of a strong background norm *combined with* the absence of any information suggesting legislative intent to overcome it — an approach such as Petitioner's, with a result as dramatic as Petitioner's, cannot be deemed mere statutory construction. Instead, Petitioner's argument constitutes the improper making of federal common law.

II. JUDICIAL CREATION OF A SPECIAL FEDERAL COMMON LAW RULE IS PERMISSIBLE ONLY IN "FEW AND RESTRICTED" CIRCUMSTANCES

A. State Law Should Not Be Displaced By Special Federal Rules Except in Rare Circumstances

Several times in recent years this Court has addressed the limited circumstances in which uniform federal common law rules of decision may be created in lieu of the adoption of state law to answer questions of federal law. *Atherton v. F.D.I.C.*, 117 S. Ct. 666 (1997); *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *See also Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68-69 (1966). The Court has stated that only in "extraordinary cases [is] judicial creation of a federal rule of decision is warranted." *O'Melveny*, 512 U.S. at 89. The Court has, moreover, applied these federalism-based holdings directly to questions about whether to displace state corporations law, and has consistently rejected the creation of federal common law tests to resolve corporations law questions arising under federal statutes. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98-99 (1991); *Burks v. Lasker, supra*, 441 U.S. at 478.

Kimbell Foods established a three-part test to limit when courts may create uniform federal rules of decision to supplant state law. Under *Kimbell*, the criteria to be considered are: (i)

the need for national uniformity, (ii) whether the application of state law would conflict with specific objectives of the federal program, and (iii) the disruption displacing state law would have on commercial relationships. 440 U.S. at 728-29.

The *Kimbell Foods* Court gave little credence to "generalized pleas for uniformity" in the absence of "concrete evidence that adopting state law would adversely affect" the federal program. *Id.* at 730. Likewise, the Court found that the threat to a federal policy must be acute and substantial; the fact that state law might "undermine its ability to recover funds disbursed" — a primary argument of Petitioner here — does not constitute a sufficient "conflict with program objectives." *Id.* at 733. And appropriate deference must be given to state law because "businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *Id.* at 739. A unanimous Court concluded that "the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Id.* at 740.[16/]

The recent *O'Melveny* and *Atherton* decisions reinforce this Court's holding in *Kimbell Foods*. In both cases the Court held that the "cases in which judicial creation of a special federal rule would be justified are 'few and restricted.'" *O'Melveny,* 512 U.S. at 87; *Atherton,* 117 S. Ct. at 670. Both cases

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[16/] It has been observed that *Kimbell Foods* "effectively establishes a ... negative presumption against federal common law" that is "the opposite side of the same coin as the Rules of Decision Act," originally § 34 of the Judiciary Act of 1789 and now codified at 28 U.S.C. § 1652, which, in turn, "[a]t a minimum ... creates a presumption in favor of state law." Sisk and Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Myers,* 16 Va. Envtl. L.J. 505, 560 (1997).

underscore the need to find unequivocally that application of state law would, in a meaningful and critical way, significantly conflict with federal policy or interests. *Id.*

O'Melveny found that it is particularly inappropriate to "supplement statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." 512 U.S. at 85. As Petitioner admits, CERCLA is such a "comprehensive" scheme. Pet. Br. 18. To allow the creation of "additional 'federal common-law' ... is not to 'supplement' this scheme, but to alter it." *O'Melveny,* 512 U.S. at 87.

The need for uniformity is commonly trumpeted as an important federal interest but such generic calls for uniformity are often "lightly invoked" and without merit. *Id.* at 88; *accord Atherton,* 117 S. Ct. at 671. Here, Petitioner makes a similar argument, citing the alleged "vagaries" of the various states' laws, Pet. Br. 40. In *O'Melveny*, this Court rejected the government's argument that uniformity was needed to facilitate its litigation, commenting that if that were so, the country would be "awash in federal common-law rules." 512 U.S. at 88 (quotations omitted). And, at any rate, despite linguistic variations, the issue of disregard of the corporate form shows substantial doctrinal consistency among the States. *E.g.*, Dennis, *Liability of Officers, Directors and Stockholders Under CERCLA: The Case For Adopting State Law,* 36 Vill. L. Rev. 1367, 1424 n.233 (1991).[17/]

[17/] Ironically, one of the primary results of creating an allegedly "uniform" federal common law of parent-subsidiary liability under CERCLA is the inconsistency the tests create. *Compare U.S. v. Kayser-Roth Corp.*, 910 F.2d at 27 (1st Cir. 1990) (applying "active involvement" test "without deciding the exact standard necessary for a parent to be an operator"), *with Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221(3d Cir.

One of the reasons cases authorizing displacement of state law are so rare is because such displacement requires a "specific concrete federal policy or interest that is compromised" by using state law. *Id.* at 88; *accord Atherton,* 117 S. Ct. at 670 (conflict is a "precondition"). In *O'Melveny* the government argued that its interest that the bank deposit insurance fund not be depleted constituted such a conflict. The same argument is made repeatedly by Petitioner in the instant case. *E.g.*, Pet. Br. at 26; 33 n.18; and 38. But in *O'Melveny* this Court held that federal common law could not be created for that purpose "because *there is no federal policy that the fund should always win.*" 512 U.S. at 88 (emphasis added). This "more money" argument has also been made and rejected in *Kimbell Foods*, 440 U.S. at 737-38, and in other cases. *See O'Melveny*, 512 U.S. at 88 (citing cases). Indeed, the very reason *why* CERCLA's "Superfund" exists is to pay for cleanups where, even under CERCLA's broad liability scheme, no solvent liable party exists — a powerful indication that Congress expressly contemplated that there would be cases where the fund would not "win."

1993) (adopting "actual control" standard, "which appears to strike the appropriate middle ground"), *with Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.) (adopting "authority to control" test), *cert. denied,* 506 U.S. 940 (1992), *with Schiavone v. Pearce,* 79 F.3d 248, 254 n.5 (2d Cir. 1996) (adopting federal common law but declining to specify its content, thus leaving businesses in the Second Circuit in the dark). The district court in this case itself observed that "different tests for liability have been developed" by the courts it followed. *CPC v. Aerojet-General,* 777 F. Supp. 549, 573. The confusion is such that even Petitioner identifies three standards and is forced to disclaim reliance on the *Nurad* standard. *See* Pet. Br. at 31 n.17. *See also Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1300 n.4 (9th Cir. 1997) ("courts that have attempted to fashion federal common law rules ... under CERCLA have created conflicts and uncertainties over a number of issues").

Last, but by no means least, Petitioner's rule would interfere with the state corporate law rules that have for decades shaped the legal expectations of parties to all types of complex business transactions, mergers and acquisitions, and in the very creation of corporate and partnership forms.[18] The States have long weighed and considered the value of limited liability and how best to provide transactional certainty. The state limited liability statutes and veil-piercing rules at issue are rules of general applicability which the States have found fit to apply to a wide variety of disputes among their own citizens. There is no showing of a "race to the bottom," or that the States have designed their corporate liability rules to defeat legitimate federal interests. *Anspec, supra,* 922 F.2d at 1250 (Kennedy, J., concurring). This disruption of long-established commercial practices weighs heavily against Petitioner.

B. The Area of Corporations Limited Liability Law Is Particularly Unsuited For Judicial Law-Making

This Court has repeatedly warned against second guessing the wisdom of state law, citing the danger of a "facile approach to federal-common-law-making." *O'Melveny,* 512 U.S. at 89. Federal common-law-making in this area will inevitably

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[18] *Accord Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J. concurring):

> Private parties have relied on state corporation law when making corporate acquisitions and in forming and dissolving corporations. The prices paid by the buyers to the sellers in those transactions undoubtedly reflected, in part, the parties' understanding concerning who retained the seller's liabilities.

See generally Sisk and Anderson, *The Sun Sets on Federal Common Law, supra,* 16 Va. Envtl. L.J. at 571-75.

encounter a myriad of legislative and policy problems, forcing judges to consider and weigh all sorts of cost-benefit issues better left to the evolution of state common law or to the legislative process. And separation of powers concerns inhere in every exercise of federal common law making, as the courts become "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id.*

It is particularly inappropriate for the federal courts to tamper with the limited liability law of the States because that law is predicated on a complex interplay of historic considerations. In *O'Melveny* this Court repeated that "the function of weighing and appraising" the multitude of considerations that make up "what sort of ... liability to impose" "is more appropriately for those who write the laws, rather than for them who interpret them." *Id.* This Court has emphasized:

> the presumption that state law should be incorporated ... is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.... Corporation law is one such area.

Kamen, 500 U.S. at 98. *See also Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a ... cause of action is based upon a federal statute."). Creating a new federal common law of limited liability (or unlimited liability) will "necessarily infuse corporate decisionmaking with uncertainty" and unsettle over a century of business practice. *Kamen,* 500 U.S. at 105.

Such a "quantum of federal common lawmaking," too, implicates substantial political and policy questions that

"exceed[] [the] federal courts' interstitial mandate." *Kamen* at 104. The "doctrine of limited liability was originally formulated, in this country, in order to implement *both* economic and democratic goals." Stephen B. Presser, PIERCING THE CORPORATE VEIL, § 1.01, at p. 1-4 (1997) (emphasis in original).[12] In its original conception, "limited liability was perceived as a means of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic," an "extremely popular

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[12] The entire question of the rationale and purpose of limited liability has been the subject of energetic scholarly and political debate for almost a century. *See* Presser, *supra,* PIERCING THE CORPORATE VEIL, Chapter 1, "Economics and Democracy: A Historical and Analytical Overview of the Piercing Doctrine." Professor Presser identifies at least three discrete *policy-based* veil-piercing schools and rationales that have developed since the beginning of the 20th Century. These policy-based standards range from the "law and economics" approach (*e.g.*, Manne, *Our Two Corporations Systems: Law and Economics,* 53 Va. L. Rev. 259 (1967); R. Winter, GOVERNMENT AND THE CORPORATION (1978); and F. Easterbrook and D. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991)), to the centrist approach based on equity and the review of the proverbial "laundry list" of factors that appears to predominate in the case law (*e.g.*, M. Wormser, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS (1927); F. Powell, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT FOR THE OBLIGATIONS OF ITS SUBSIDIARY (1931); and R. Clark, *The Duties of the Corporate Debtor to its Creditors,* 90 Harv. L. Rev. 505 (1977)), to approaches "on the left," Presser at § 1.01, p.1-8 n.13, that would reduce or eliminate limited liability (*e.g.*, P. Blumberg, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW 681-92 (1987) (advocating elimination of limited liability for affiliated corporations); and Hansmann & Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts,* 100 Yale L.J. 1879 (1991)).

Not coincidentally, Petitioner's Brief cites three of Professor Blumberg's books and articles, Pet. Br. 33, 39, 40, but none from any of the competing policy schools in Petitioner's attempt to have this Court make the legislative choice that Congress left to the States and to state law.

justification for limited liability ... rarely observed by modern scholars." *Id.* at p.1-14. Indeed, "if we are still interested in encouraging individual entrepreneurship through incorporation, this ought to be, perhaps, the most crucial aspect to be considered in veil-piercing doctrine." *Id.* at p.1-48.

Limited liability also reduces the potential costs and risks of buying shares, and thus encourages investment and capital formation. *Id.* at p.1-42. "[I]nsulating parents from liability [for] their subsidiar[ies'] activities reduces the costs to the parent," making the parent's shares more valuable and creating added incentive to invest. *Id.* at p.1-68 n.43.10. Limited liability also "facilitates the development of public markets for securities, permits the allocation of risk or benefits between parties, and supports the certainty of planning by those who have organized the corporation." Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1073 (1991). Some scholars argue that without limited liability "shareholders would find it necessary to monitor closely the activities of their corporations in order to escape liability, and that the high cost of this monitoring would itself discourage investment." Presser, *supra*, at p.1-40. The reduction in monitoring obligations afforded by limited liability likely makes diversification of investment possible. *Id.* "[I]n an era when grave concern is expressed that corporations are too inclined to use debt rather than equity for financing, we should hesitate before undercutting any legal doctrines that appear to promote equity investment." *Id.* at p.1-70. Professor Presser concludes "[a]bsent clear indication from the legislature ... it is difficult to understand how courts can be justified in piercing the veil in a manner that ignores the original legislative justification, the promotion of investment." *Id.* at p.1-69.

The federal courts, in particular, are neither equipped nor

empowered to determine that other policies are more important.[20] The risks of federal judicial law-making are perhaps best exemplified in the Petitioner's own brief, where it sets forth the factual test it would use to implement its "control and participation" legal standard of "operator" liability. According to the Petitioner, "a parent corporation [that] steps beyond its role as a stockholder" of a subsidiary would be liable. Pet. Br. 41. Petitioner would still allow a parent corporation to "exercise [the] traditional powers" of stock ownership, which *Petitioner* would define as the right to "choose the subsidiary's board of directors and to vote on general matters of corporate governance...." *Id.* at 43. "If the parent corporation, however, departs from the [assertedly] typical practice and employs its own agents as executive directors (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, operating" and CERCLA liability will attach. *Id.* at 44.

The facts are, however, that many — if not most — parent corporations place one or more their officers in senior officer or board positions at their subsidiaries and have long done so under sanction of state law.[21] Under Petitioner's federal

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[20] *See* Presser, *supra*, at p. 1-71 (citation omitted):

> If we are committed to federal and state policies of encouraging investments, it would seem dubious to entrust even the federal courts with what would amount to a delicate task of balancing the policies of encouraging investment and the other, more particularized federal regulatory or welfare goals.... It would seem better, as [Harvard Dean] Clark suggested, to let these delicate balancing acts be performed by the more democratic organs of the state and federal legislatures.

[21] This case does not present the situation where employees of the parent who are not employees of the subsidiary have full-time jobs operating the

common law test, appointment of dual officers, though woefully insufficient to cause the corporate veil to be pierced, would now result in CERCLA liability. The *en banc* Sixth Circuit below correctly observed that the government's test:

> replaces the relatively bright line provided by the traditional doctrine ... with a nebulous 'control' test. When, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability? The indicia enumerated ..., such as participation ... and involvement in specific policy decisions, offer little guidance.

United States v. Cordova Chem., 113 F.3d at 580.

Petitioner's test completely ignores the significant issue of role attribution — the long-standing presumption in corporations law that an individual can "wear two hats" and be an officer of both companies, and that when such a dual officer acts in his role as an officer of the subsidiary he binds only *that* corporation. It is a fundamental principle that an officer's actions are *only* attributable to the company on whose behalf he is acting unless one is justified in disregarding the corporate form. As one court described it:

> one-hundred percent ownership *and identity* of directors and officers are, even together, an insufficient basis ... to pierce the corporate veil. Instead, we maintain the fiction that an officer or director of both corporations can change

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subsidiary's business. The court below made a similar observation. 113 F.3d at 579 (case does involve a parent which "independently operate[s] ... in the stead of its subsidiary or as a sort of joint venturer ... alongside its subsidiary"). What test to apply in such a case is not before this Court.

> hats and represent the two corporations separately, despite their common ownership.

United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (citations omitted).[22] Under general corporation law, then, the actions of dual officers or directors affecting the subsidiary are attributable only to the subsidiary unless the veil can be pierced. Any other rule necessarily would result in parent liability for all of a subsidiary's torts or contracts whenever a dual-role person is involved. The government's proposed test invites just such a result.[23]

III. THE QUESTION IN THIS CASE ARISES IN MANY OTHER SITUATIONS UNDER CERCLA

The instant situation — whether to apply existing state law or, instead, create a federal common law rule to determine

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[22] *Accord United States Fire Ins. Co. v. Allied Towing Corp.*, 966 F.2d 820, 828-29 (4th Cir. 1992) (in case of two corporations with identical ownership, boards and management, it was improper to "pierce[] Transerve Marine's corporate veil [by] holding it responsible for the [negligent] inaction of its officers and directors in their capacities as *Allied Towing's* officers and directors") (emphasis in original).

[23] Petitioner's test is doubly improper when one remembers the retroactive nature of CERCLA liability. Petitioner's test would impose liability for business practices based on state law principles that have been in place for nearly a century and — *without any hint of Congressional intent to do so* — would reallocate risk for liabilities flowing from ancient business transactions and practices. Long prior to CERCLA, corporations made decisions about officers' or board members' participation in a subsidiary's corporate governance based upon approved principles of law in effect in their states. Petitioner's test would change the rules after the fact, creating a different standard under the guise of federal common law.

whether a parent corporation is liable under CERCLA at a facility operated by its subsidiary — is only one of several analogous questions of what law to apply that have repeatedly arisen under CERCLA, emphasizing the importance of faithfulness to the federal courts' limited role.

Similar questions arise when a claimant seeks to hold a purchaser of assets from a site owner or operator liable as a "successor" to that owner or operator. Should the court apply the traditional state law asset-purchaser non-liability rule, with its four usual exceptions,[24] or should the court adopt a new federal common law standard perceived by it to further the "goals" of CERCLA?[25] What about when the site operator is a dissolved corporation? Should the court apply state law governing the capacity to sue that corporation[26] or may it develop a special federal common law standard which preempts state corporate dissolution law to address that dissolved corporation's liability?[27] And what if an individual owner or

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[24] *See Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997) (applying state law).

[25] *E.g., United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (adopting federal "substantial continuity" test); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992) (adopting "substantial continuity" test but only if buyer knows of seller's liability).

[26] *E.g., Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987) ("CERCLA does not preempt California law determining capacity [of a dissolved corporation] to be sued"); *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (same, but finding that even if CERCLA preempts F.R. Civ. P. 17 then, under *O'Melveny*, state law would apply).

[27] *E.g., Town of Oyster Bay v. Occidental Chem. Corp.*, 1997 U.S. Dist. Lexis 18151, at *46-47 (E.D.N.Y. Nov. 14, 1997) ("finding Rule 17(b) to

operator is dead? Should the federal court apply generally applicable state probate law regarding the pursuit of claims against estates[28] or is state probate law preempted in favor of a federal policy-based common law rule designed to enhance recoveries from decedents' estates and their beneficiaries?[29] Similar questions have arisen when CERCLA claims are filed against officers, directors or sole shareholders of corporate owners or operators, especially in close corporations,[30] and

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be superseded in the CERCLA context" but noting that "there is no single uniform approach" to the substitute federal common law rule); *New York v. Panex Indus., Inc.*, 1996 U.S. Dist. Lexis 9418, at *17 (W.D.N.Y. 1996) ("CERCLA supersedes FRCvP 17(b) and preempts state [capacity] law," collecting cases at n.23); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1152 (N.D. Fla. 1994) (federal common law "dead and buried" test); *U.S. v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1496-98 (D. Utah 1987) (state law preempted where corporation is dead but "the funeral is still going on").

[28] *See Witco Corp. v. Beekhuis*, 38 F.3d 682, 690 (3d Cir. 1994) (respecting state probate law: "It is untenable that Congress intended to reach so deep into the domain of state probate administration and use the heavy hand of CERCLA to disturb and upset long-settled estates.").

[29] *E.g., North Carolina v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 743 (E.D.N.C. 1995) (approving claim under federal common law "trust fund theory" against widow who inherited from deceased operator's estate, which was fully and properly closed under state law eight years earlier, because such claim "furthers CERCLA's remedial purpose"); *Soo Line R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1485 (D. Minn. 1992) (finding claim-timing provisions of Nevada probate law preempted because Nevada law would "release responsible parties from liability").

[30] *Compare Donahey v. Bogle*, 129 F.3d 838 (6th Cir. 1997), *pet. for cert. pending*, U.S. No. 97-1163 (even sole shareholders of close corporations will be protected by the corporate form unless the veil can be pierced), *with Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1544 (W.D. Mich. 1989) (corporate officer, director or sole shareholder is liable under CERCLA if he "could have prevented or significantly abated the ... discharge that is the

when claims are filed against the limited partners of limited partnerships that may be CERCLA owners or operators.[31]

The federal courts have splintered in their approach to every one of these questions, sometimes following *Kimbell Foods* but usually exhibiting a lack of fealty and deference to governing state law principles. Correctly, one recent decision adopted the reasoning of *Kimbell Foods*, *O'Melveny*, and *Atherton* and applied state law to resolve a successor liability question. *See*

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subject of the claim," a test based on "an individual's authority to control." Test averred to be "consistent with CERCLA's goals" and "will encourage increased responsibility" which, the district judge wrote, "I take ... to be a positive result...."); *accord Donahey v. Bogle*, 129 F.3d at 845-46 (Martin, C.J., dissenting, urging adoption of *Kelley*'s "prevention" test as law of Sixth Circuit). *See also Riverside Market Dev. Corp. v. International Bldg. Products, Inc.*, 931 F.2d 327 (5th Cir.) (per curiam), *cert. denied*, 502 U.S. 1004 (1991), and *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417 (7th Cir. 1994) (applying a legal standard — *improperly* derived directly from CERCLA, but essentially identical to the common law test — asking whether corporate officer was "*directly* and *personally* engaged in conduct that led to the specific environmental damage at issue in the case," *e.g.*, *Arst*, 25 F.3d at 421 (emphasis in original)).

[31] *E.g.*, *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1503-05 (11th Cir. 1996). Because the Eleventh Circuit had previously adopted a rule like the one Petitioner urges here that extends "operator" liability to parent companies under a "control" standard, *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1109-11 (11th Cir. 1993), the court applied that same rule to evaluate the liability of limited partners as CERCLA "operators." Under that rule a limited partner would be liable if it:

> either (1) actually participated in operating the Site ... or (2) actually exercised control over or [3] [were] otherwise intimately involved in the operations of, the Partnership.

94 F.3d at 1505. Such a test, of course, rewrites the Uniform Limited Partnership Act in force in almost every state.

Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., *supra*, (*"ATSF"*).[32] As shown above, however, other courts have improperly developed federal common law tests they unilaterally deemed "superior to the older and more inflexible" state law rules to answer these questions. *E.g.*, *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519, *reh. denied*, 112 F.3d 88 (2d Cir. 1997), *pet. for cert. pending sub nom. Zollo Drum Co., Inc. v. B.F. Goodrich Co.*, U.S. No. 97-241. The resulting chaos in the CERCLA law is predictable. *See* Sisk and Anderson, *supra*, *The Sun Sets on Federal Common Law*, 16 Va. Envtl. L.J. at 565-67.

The recently decided *Atchison, Topeka & Santa Fe Ry. Co.* case correctly analyzed the appropriate rule to use under CERCLA. There, the Ninth Circuit rejected the argument that a special federal rule under CERCLA should displace state law to address the successor liability of asset purchasers. The Ninth Circuit recognized the reach of *O'Melveny* and *Atherton*:

> Although *O'Melveny* and *Atherton* involve a different federal statute, the underlying analysis is applicable in any situation in which it is necessary to determine whether state law should be supplanted by judicially created federal rules of decision.

132 F.3d at 1299. The court specifically noted *O'Melveny*'s teaching that Congress' silence indicates *not* that the federal

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[32] A few other federal courts, even before this Court decided *O'Melveny* and *Atherton*, had used the *Kimbell Foods* test and decided to adopt traditional corporations law as the federal rule of decision to answer liability questions under CERCLA. *Joslyn v. T.L. James & Co.*, 696 F. Supp. 222, 226-27 (W.D. La. 1988), *aff'd*, 893 F.2d 80, 83 (5th Cir. 1990) (parent-subsidiary question); *Anspec Co. v. Johnson Controls*, 922 F.2d at 1248-51 (Kennedy, J., concurring) (successor liability).

courts should develop their own rules of law but, instead, that they should rely on state law unless the test set forth in *Kimbell Foods* is met. *Id.* Examining the three *Kimbell* factors, the *ATSF* court found, first, that "there has been no real explanation of the need for uniformity" and that "'the law in the fifty states on corporate dissolution and successor liability is largely uniform.'" *Id.* at 1300, *quoting Anspec*, 922 F.2d at 1249. Finding that "the argued 'need' for uniformity ... stem[med] not from disarray among the various states, but from the alleged need for a more expansive view" of liability, the court found "no evidence that the application of state corporation law will frustrate" CERCLA's objectives. *Id.* at 1300-01. "'[M]ore money' arguments," it found, "are unavailing." *Id.* at 1301. State law was thus applied.

CONCLUSION

The breadth of the damage done by the federal courts in the name of CERCLA's "intended" purpose but in derogation of state law is virtually unlimited. The simple solution — and one consistent with constitutional principles of separation of powers and federalism — is to adhere to long-standing state law precepts of limited liability, which Congress nowhere evidenced any intent to supplant. The decision of the Sixth Circuit should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE UNITED STATES BUSINESS & INDUSTRIAL COUNCIL IN SUPPORT OF RESPONDENTS

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The United States Business & Industrial Council ("USBIC"), as amicus curiae, respectfully submits this brief in support of Respondents CPC International Inc.,[1] Aerojet-General Corporation, Cordova Chemical Company, and Cordova Chemical Company of Michigan, pursuant to Rule 37.3 of the Supreme Court Rules. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

USBIC is a 65-year-old nonprofit business league and policy center headquatered in Washington, D.C. USBIC's approximately 1,100-firm membership spans 44 states and ranges from Fortune 500 corporations to small entrepreneurial enterprises. Drawn from the manufacturing, energy, real estate and financial services sectors of the national economy, these companies are generally major employers in their communities and mainstays of local economies. USBIC has consistently promoted a less intrusive government, adoption of market-oriented regulatory solutions, and fiscal responsibility.

The issues presented in this case arising under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), are of particular concern to USBIC's members and directly affect USBIC's longstanding mission. The continuing success of the American free enterprise system depends closely on the innovation, drive, vision, and hard work of entrepreneurs and incorporators. The limited liability corporate form has created more jobs,

[1] While USBIC understands that CPC International Inc. may now be known as "Bestfoods", throughout this brief the company will be referred to as "CPC."

*No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief.

income, wealth, economic growth and opportunity than any other organizational form in history.

The decision of the United States Court of Appeals for the Sixth Circuit now before this Court supports the well-established concept of limited corporate liability, on which USBIC's members have long relied. The Sixth Circuit's opinion provides a sense of balance, integrity and legitimacy to environmental statutory and regulatory enforcement, by rejecting the government's nearly boundless views on the scope of environmental liability. The decision of the Sixth Circuit also respects the indispensable role of state law, under which many of USBIC's members have been incorporated, in determining what is – and what is not – a corporation and the circumstances under which a corporate form may be disregarded. The Sixth Circuit's opinion promotes good corporate citizenship, by encouraging parent corporations to become and remain involved in subsidiary corporations and not to distance themselves from the environmental compliance activities of related corporations. Finally, USBIC strongly believes that the standard of liability under CERCLA urged by Petitioner United States of America ("Petitioner") represents such a dramatic departure from current economic realities and business expectations that such a standard should not be judicially imposed.

SUMMARY OF ARGUMENT

Since CERCLA's enactment, the courts have cast an exceedingly confused web of interpretation over the statutory text. Particularly in the area of corporate liability, and as was the case with the district court below, judges have interwoven concepts of direct liability with selected

principles of vicarious liability to create "new, middle ground" for finding CERCLA liability. *CPC International, Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 573 (W.D. Mich. 1991) (Petitioner's Appendix ("Pet. App.") at 107a).[2] The result is a judge-made, conceptual "grab-bag" that dramatically expands the scope of CERCLA liability, taking it even further out of balance with the exceedingly powerful remedies Congress created for those who successfully invoke the statute. Thus, USBIC urges the Court to affirm the Sixth Circuit's decision, and hold that a parent corporation may not be held liable under CERCLA section 107(a)(2) as an "operator" of a facility owned or operated by a subsidiary corporation absent the existence of circumstances warranting piercing the corporate veil under applicable state law.[3]

A. When it enacted CERCLA, Congress identified four bounded categories of potentially liable persons and no others. 42 U.S.C. §9607(a). The legislative determination to restrict liability to these discrete categories of persons was well founded, because the courts later held it was Congress' intent to make liability under the statute strict, as well as joint and several. *See, e.g., United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535

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[2] *See also, United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221-23 & n.13 (3d Cir. 1993); *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1089-91 (8th Cir. 1995), *cert. denied*, 117 S.Ct. 50 (1996); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993).

[3] USBIC supports the Sixth Circuit's decision that parent corporations may not be liable under CERCLA section 107(a)(2) unless circumstances requiring piercing of the corporate veil exist as applied by the Sixth Circuit to CPC and Aerojet-General Corporation, and as a general rule.

(10th Cir. 1995). The liability of "owners," "operators," "arrangers," and "transporters" arises from their direct and actual relationship with a facility where hazardous substances have been released into the environment. 42 U.S.C. §9607(a).

In this case involving the contours of "operator" liability under CERCLA, the *en banc* opinion of the Sixth Circuit acknowledges that any "operator" with such direct involvement with the facility in question may be liable. Pet. App. at 17a-18a. Contrary to Petitioner's contention that the Sixth Circuit's opinion "absolves parent corporations of liability," Brief of Petitioner United States ("Pet. Br.") at 16, the decision *maintains* full liability under CERCLA for parent corporations that effectively operate, through sham subsidiaries, facilities where hazardous substances have been released into the environment. Pet. App. at 17a-18a. The Sixth Circuit's opinion merely reaffirms Congress' intention – expressed in the plain words of the statute – that parent corporations are not liable as operators under CERCLA merely because they may exercise "control" over viable subsidiary corporations. The object of "operator" conduct triggering liability is a facility, not another firm.

B. The courts imposing "direct" operator liability in disregard of the corporate form have typically engaged in a truncated vicarious liability analysis *sub silentio*. Relying on factual conclusions about the percentage of subsidiary stock owned by the parent, involvement with the subsidiary's board of directors, and inter-corporate policy-setting arrangements, the district court's opinion in this case is representative of this abbreviated derivative liability analysis masquerading as a test for "direct" liability.

Because corporations are creatures of state law, issues concerning a corporation's formation, organization, constitution, governance, viability, and formal existence turn on the law of the incorporating jurisdiction. CERCLA's structure and text reflect Congress' intent to look to state law in determining whether, and under what circumstances, a state law-created corporation may nonetheless be disregarded in favor of holding another party, with no direct ties to the facility in question, vicariously liable for the disregarded corporation's actions.

Petitioner argues that the Court effectively should read into CERCLA's text phrases like "active participation" and "control." The transparent objective of such additions to the legislated words is to supplant the well developed body of state law that routinely guides the courts in determining when the corporate veil is to be pierced. Similarly, by giving the label "direct liability" to conduct that is normally one of many factors weighed to determine vicarious liability, Petitioner plainly seeks to avoid the common law factors historically applied to determine whether the separate existence of a corporation should be recognized or disregarded.

C. Nowhere in CERCLA's structure or text did Congress manifest a clear intention to ignore or preempt state law on the scope of parent corporate liability. Nor does the statute suggest it was Congress' aim to commission federal courts to develop a body of federal common law on the subject of what is, and what is not, a viable corporation for purposes of imposing liability under CERCLA. Under this Court's decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), this determination is not a matter of federal common law. This is so because the federal interest in a uniform federal rule of parent corporate liability under CERCLA is weak, application of state law-based limited liability would not frus-

trate CERCLA's purpose, and derogation of well-established state veil-piercing standards would disrupt everyday commercial relationships founded on those standards.

D. The inescapable effect of Petitioner's argument is that, at least for the special purpose of imposing liability under CERCLA, the liability limits that customarily insulate owners of valid corporations are not so limited after all. It is the province of Congress only to consider and undertake such a dramatic change in fundamental principles of corporate law, organization and governance. Because the wholesale expansion of parent corporate liability urged by Petitioner would carry a substantial environmental and economic price, the legislature is better suited than the courts to weigh those costs against the purported benefits Petitioner asserts will accrue if its construction of the statute is adopted.

ARGUMENT

A. The Sixth Circuit Correctly Applied the Plain Language of CERCLA to Hold that Direct Liability is Applicable Only to the Entity Which Actually Operated the Facility.

CERCLA establishes four specific categories of "covered persons" and imposes liability only on persons who fall within those categories. 42 U.S.C. §9607(a). That Congress elected to limit CERCLA's reach to these discrete categories makes sense because liability under the statute has been held to be strict, as well as joint and several. *See, e.g., United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995). Indeed, CERCLA affords exceedingly powerful remedies to parties who successfully invoke it. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11, 21, (1989). Petitioner now seeks to

expand the already broad and powerful liability provisions of CERCLA far beyond reason and Congress' intent.

At issue in this case is the category that establishes CERCLA liability for "person[s] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. §9607(a)(2). With respect to so-called "operator" liability, the statute imposes liability only on a party that can be shown to have operated the facility itself. Stated differently, the putative operator's ties to the facility must be actual and direct. Nothing in the statute remotely suggests liability attaches merely because one firm operates another firm which, in turn, operates a facility. Indeed, the statute elsewhere defines an "owner or operator" as the person "owning or operating *such facility.*" 42 U.S.C. §9601(20)(A)(ii)(emphasis added). CERCLA's plain language confirms Congress' design that the object of an operator's conduct giving rise to liability under CERCLA must be the facility, not merely another alleged operator.

Petitioner's attempt to shift the inquiry from actual "operation" of a contaminated facility to "control" or "management" of a related firm is not supported by the statute. In the primary liability provision of the statute, Congress used the word "operated," not "controlled" or "managed." 42 U.S.C. §9607(a)(2). In the definition of "owner or operator," Congress used the terms "otherwise control" and "participate in management" to address very specific situations not applicable here. If the terms were at all synonymous, Congress simply could have continued to use "operate" to capture all forms of activity giving rise to potential liability.

"Control" is only relevant where a facility has been conveyed to a governmental authority through abandon-

ment, bankruptcy or the like. 42 U.S.C. §9601(20)(A)-(iii). Congress provided that in such situations, an owner or operator is anyone "who owned, operated, or otherwise controlled activities at such facility" immediately before the conveyance. If "control" were synonymous with "operate," the language "or otherwise controlled" would be superfluous, an interpretive result to be avoided. *See, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 683 (1973). The fact that Congress used the term "otherwise controlled" in this context, but omitted it from the more generally applicable subsection of the definition (42 U.S.C. §9601(20)(A)(ii)), indicates that control is irrelevant to operator determinations in general. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); *United States v. Dart Industries, Inc.*, 847 F.2d 144, 146 (4th Cir. 1988).

Likewise, "management" is relevant only in one limited situation, not present in this case. In defining "owner or operator," Congress expressly provided that "such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. §9601(20)-(A). Stated differently, a person who is the title owner of a facility (and so would be liable as an owner) is exempted from liability provided he does not "participate in management" of the facility.

Contrary to Petitioner's contention, the CERCLA liability of lenders who "participate in management" of a facility is not analogous to the operator liability of a parent who participates in the management of its subsidiary. Pet. Br. at 23. Lenders are liable for participation in the management of a *facility*, not in the management of borrower *firms*. 42 U.S.C. §9601(20)(F)-(i).

If "operate" were synonymous with "participate in management," as Petitioner contends, Congress could simply have again used the word operate. Yet Congress chose to use different language and to set a different standard for the exemption of certain lenders. "Participation in management" determines whether one who is already liable as an owner is nonetheless entitled to an exemption from the liability. The term at issue here – "operate" – governs whether liability attaches at all. The question, then, is not whether an otherwise liable person is entitled to an exemption but whether a parent corporation, which does not own the facility, is liable in the first place as an operator. Congress intended different standards as evinced by its use of different language even within the same definitional section.[4]

The Sixth Circuit properly rejected Petitioner's effort to use "control" or "management" as a proxy for "operate." The term "operate," with its connotations of physical presence and participation in the day-to-day mechanics of a process, is the word chosen by Congress to trigger liability. For a parent corporation, shareholder, or anyone else to be held directly liable under CERCLA

[4] Petitioner attempts to equate the standards by assuming precisely what is at issue, namely whether a parent corporation is an operator. Petitioner assumes that CPC is an operator and then suggests that parent corporations should not be permitted to escape liability by hiding behind its lack of ownership of the facility. In this vein, Petitioner correctly points out that CERCLA imposes liability, in the disjunctive, on owners *or* operators. Pet. Br. at 21. Of course, the real question is not whether a parent corporation is exempted from CERCLA liability, by virtue either of its non-ownership or based on state law-inspired limited liability principles, but whether it is liable in the first place.

it must actually *operate* the *facility*. 42 U.S.C. §9607(a). As noted by the Sixth Circuit, a parent corporation could thus be liable if it operated the facility "in the stead of its subsidiary; or, as a sort of joint venturer. . . ." *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 579 (6th Cir. 1997) (Pet. App. at 12a). Absent such actual, physical and direct operation of a contaminated facility, the plain language of the statute precludes a parent corporation from being held directly liable as a CERCLA operator.

B. The Sixth Circuit Correctly Held that Vicarious Liability Under CERCLA Should Be Determined According to Traditional Principles of Corporate Law.

1. The District Court's Decision Has the Effect of Imposing Vicarious Liability on Parent Corporations.

Even as they insist that parent corporations and shareholders can be "directly" liable under CERCLA, the courts imposing liability in disregard of the corporate form actually have engaged in a derivative liability analysis.[5] Such courts typically have engaged in at least some examination of the relationship between the target corporation or shareholder and the actual owner of the facility.[6] Indeed, the district court in this case held that

> a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence *over its subsidiary* by actively participating in and exercising control *over the subsidiary's business* during a period of disposal of hazardous waste. A parent's actual participation in and control *over a subsidiary's functions and decision-making* creates 'operator' liability under CERCLA. . . ."

Pet. App. at 107a (emphasis added).

[5] *See, e.g., United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993).

[6] *Id.*

Thus, the district court held CPC liable not because the corporation itself was operating the facility, but because it actively managed its subsidiary. This is classic vicarious liability. The district court deemed the parent corporation to be the operator of the facility through its subsidiary, and charged the parent with legal responsibility for the acts or omissions of the subsidiary.

That the district court was actually imposing vicarious liability rather than direct liability is further reflected in the factors cited as relevant by the court. In imposing liability, the court pointed to its findings that the parent owned 100% of its subsidiary's stock, participated in its subsidiary's board of directors, set policies for the subsidiary, and controlled the subsidiary's budget. Pet. App. at 16a-17a. These factors all focus on the relationship between the parent and its subsidiary, rather than on the parent corporation's direct involvement in or relationship with the facility itself. These factors are aimed at determining whether the parent exercised an excessive amount of control over the subsidiary, such that it should be charged with vicarious liability for the conduct of its subsidiary.

In sum, the district court incorrectly concluded that a parent corporation in merely overseeing its subsidiary's activities acts directly, rather than vicariously, vis-a-vis a facility. The mistaken assumption led to the misapplication of selected factors for establishing vicarious liability, all under the guise of imposing direct liability.

2. The District Court Improperly Preempted Traditional Principles of Vicarious Liability.

As discussed above, the common law has developed principles of limited corporate liability, as well as standards for imposing vicarious liability in factual circumstances that warrant disregarding the corporate form. By labeling the parent's oversight activities as "direct," the district court sidestepped those traditional standards and created a self-proclaimed "new, middle ground" test for determining when liability attaches under CERCLA. What the district court did in creating this new test was to borrow selectively from a few of the traditional standards for imposing vicarious corporate liability and ignore others altogether. The result is a substantial lowering of the common law threshold for imposing vicarious liability.

Such selective preemption of established state corporations law lacks any support or justification, and certainly was not authorized by Congress when it enacted CERCLA. In fact, in several provisions in the statute Congress indicated its express intent that CERCLA not preempt established state law. *See* 42 U.S.C. §§9614(a) and 9652(d). One indication of Congress' intent to adopt, not supplant, state corporations law was its inclusion of the very term "corporation" within CERCLA's definition of "person." *See* 42 U.S.C. §9601(21). Congress did so without altering, explaining or defining what it means to be a "corporation." This is further evidence that Congress plainly adopted the body of state law which creates, authorizes and governs corporations in fashioning the contours of liability under CERCLA. The strained reading of CERCLA urged by Petitioner depends entirely on the implausible notion that Congress looked to state law to determine what a

"corporation" is, only to ignore state law in determining whether a "corporation" should be disregarded.[7]

Federal law cannot preempt state law unless it is the "clear and manifest" purpose of Congress to do so. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). Certainly Congress manifested no such purpose to supplant state corporations law in enacting CERCLA.

Indeed, to preempt state corporations law by imposing CERCLA liability without regard to state limited liability principles would be inconsistent with the policies and objectives of the statute. Petitioner contends in effect that CERCLA's core purpose is to preserve and replenish the "Superfund" by reaching the broadest possible swath of potentially responsible parties capable of reimbursing the government for clean-up expenses. The courts have given some recognition to this statutory purpose. *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 779 (7th Cir. 1992); *United Technologies Corp. v. EPA*, 821 F.2d 714, 722 (D.C. Cir. 1987). There is more to CERCLA, however, than replenishment of the Superfund. In enacting the statute, it was equally important to encourage private par-

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[7] That Congress knew how to preempt state law where it wanted to is seen in its modification of the term "owner." Like "corporation," the term "owner" is defined by state, rather than federal law – who holds title and, therefore, ownership is a matter of state law. But Congress expressly altered state property law to provide that if a person holds indicia of ownership primarily to protect its security interest, it is not an "owner" under CERCLA, even though it would otherwise be an "owner" as defined by state property law. *See* 42 U.S.C. §9601(20)(A). No such express preemption of state corporations law appears anywhere in the statute or its legislative history.

ties voluntarily to cleanup sites where hazardous substances have been released. H.R. Rep. No. 253, 99th Cong., 1st Sess. (1985) ("It is the intent of this Committee to encourage private party cleanup at all sites."). If parent corporations are deemed liable merely because they "actively participate in" or "directly control" the subsidiary companies through ordinary conduct aimed at safeguarding their investments, the inevitable result will be to discourage inter-corporate investment in firms facing environmental exposure, to raise the costs of capital for such firms, and thus to constrain the availability of resources for voluntary environmental remediation. Pet. App. at 14a.

Indeed, the distortion of CERCLA urged by Petitioner would result in passive investing becoming the norm. Parent corporations would abstain from setting environmental compliance policies and from overseeing the environmental remediation activities of their subsidiaries, precisely to avoid the types of inter-corporate involvement that could trigger CERCLA liability. Thus, the statutory construction advanced by Petitioner would, at once, perversely place additional strains on scarce Superfund resources, as well as undermine the goal of encouraging private parties to take affirmative steps to cleanup hazardous waste sites.

3. Petitioner's Novel Theory of "Direct" Parent Corporate Liability for Subsidiary Corporate Agents is Without Merit.

Petitioner carelessly suggests that "direct" CERCLA operator liability attaches to a parent corporation under common law principles of *respondeat superior*, when a parent's officers and directors also serve in the management and on the board of the subsidiary enterprise actually operating a CERCLA facility. Pet. Br. at 33-34 and

n.19. Because "[a] corporation is responsible for the wrongs committed by its agents in the course of its business," Petitioner contends the parent is "directly" liable for the acts or omissions of such "dual-hatted" agents. As Petitioner would have it, commonality of officers and directors between parent and subsidiary corporations would *ipso facto* result in liability for the parent, because the parent is always *vicariously* liable for the acts of its employees. Pet. Br. at 33-34.

The law does not support Petitioner's mixture of direct and vicarious liability principles. First, such a rule would effectively eviscerate the common law of veil-piercing. The courts have consistently acknowledged, both in CERCLA and non-CERCLA contexts, that commonality of officers and directors is itself insufficient to attribute to a corporate parent the liabilities of its subsidiary.[8] Second, such a rule would gloss over entirely the facts of each case. Precisely when parent corporate officers, who also serve in subsidiary management, are acting within or without the scope of their duties to the parent corporation is a necessarily fact-bound, case-specific inquiry. Petitioner's novel *per se* rule is without any legal reason or support, and would result in grave injustices.

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[8] *See, e.g., United States v. TIC Investment Corp.*, 68 F.3d 1082, 1092 (8th Cir. 1995), *cert. denied*, 117 S.Ct. 50 (1996) ("The mere fact that . . . individuals who were officers and directors of [parent corporations] concurrently served as officers and directors for [subsidiary corporation] does not, in and of itself, tend to establish the [parent corporation's] liability."); *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 982 (4th Cir. 1987); *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

C. The Sixth Circuit Properly Concluded that State Veil-Piercing Law Applies in Determining Whether a Parent Corporation Should be Held Liable Under CERCLA Section 107(a)(2).

The Sixth Circuit correctly applied state law principles of veil piercing in determining the liability of parent corporations as "operators" under CERCLA section 107(a)(2). In so doing, the Sixth Circuit appropriately rejected any suggestion that Congress intended to empower federal courts to develop a body of federal common law on this subject. The Sixth Circuit's decision is also consistent with the plain language of CERCLA and the three-factor test pronounced by this Court in *Kimbell Foods*, concerning the circumstances under which state law should be applied under federal programs.

1. Plain Language of CERCLA and Congress' Intent.

The "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986). In the case of CERCLA, nothing in the text of the statute or in its legislative history provides any indication that Congress intended to supplant traditional state corporate laws governing parent liability. "CERCLA does not define . . . 'operators' as including the parent company of offending wholly owned subsidiaries. Nor does the statute's legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law." *Joslyn Mfg.*

Co., 893 F.2d at 82.[9] As the Sixth Circuit concluded in this case, "if Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." Pet. App. at 14a.

2. *Kimbell Foods* Supports Deference to and Adoption of State Corporations Law.

It is well established that "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods*, 440 U.S. at 727-28); *see also Anspec Co. v. Johnson Controls, Inc.*, 922 F.3d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring).[10] On the contrary, federal law can and appropriately should adopt and incorporate state law rules under certain circumstances. As this Court has observed, the decision to "adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " *Kimbell*

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[9] Several courts have held that, in considering whether to apply state law in similar contexts under CERCLA, the statute does not override traditional principles of state law. *See, e.g., United States v. USX Corp.*, 68 F.3d 811, 824 (3rd Cir. 1995) (CERCLA's language "fails to indicate that traditional concepts of limited liability are to be disregarded"); *City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994) (the liability of a successor corporation for CERCLA obligations is determined by reference to state law).

[10] This conclusion is also supported by the Rules of Decision Act: "The laws of the several states, except where Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. §1652.

Foods, 440 U.S. at 728 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947)).

The first step in evaluating whether to apply state law or to fashion a federal common law rule of decision is to look to the language of the federal statute to determine Congress' intent. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986) (citing *Kimbell Foods*, 440 U.S. at 740). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress . . . ." *Atherton v. Federal Deposit Ins. Corp.*, 117 S.Ct. 666, 670 (1997). In the case of CERCLA, nothing in the statute's text or legislative history provides any indication that Congress intended to supplant traditional state corporations law with a new, uniform federal common law rule for operator liability.

"It is precisely when Congress has not spoken," that it is up to the federal courts to fill in the gaps of federal legislation "according to their own standards." *Kimbell Foods*, 440 U.S. at 727. This does not mean, however, that the federal courts are free to formulate a uniform federal common law rule to fill those gaps. *Id.* at 727-28; *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 117 S.Ct. 1590, 1617-18 & n.9 (1997) (Thomas, J., dissenting). Rather, resort must be made to the stringent choice-of-law inquiry set forth in *Kimbell Foods*, to determine whether the courts are permitted to develop a uniform federal common law rule or, instead, are to adopt state law as the applicable federal rule of decision.

Kimbell Foods establishes the following three factors to guide the courts in determining whether federal common law or applicable state law should bridge the choice of law gap in a federal statute: (1) whether the matter

requires a nationally uniform body of law; (2) whether the application of state law would frustrate special objectives of the federal program; and (3) whether application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 728-29. This test should be applied against the backdrop of this Court's determination that the circumstances justifying judicial creation of a special federal rule are "few and restricted," and are limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994).

Application of the three-part *Kimbell Foods* inquiry to the present controversy compels the conclusion that state law is to provide the controlling rule of decision for determining when parent corporations should be held liable as operators under section 107(a)(2) of CERCLA. All three of the *Kimbell Foods* factors support the application of state law in this context.

a. No Substantial Need Exists for a Uniform Body of Law on Parent Corporate Liability Under CERCLA.

Any need for a nationally uniform body of law to determine parent corporation liability under section 107(a)(2) is not substantial enough to warrant the judicial, rather than legislative, creation of such a body of law. Initially, as this Court has recognized, the federal interest in uniformity is the "most generic and lightly evoked" of all potentially alleged federal interests. *O'Melveny & Myers*, 512 U.S. at 88. In any event, however, the vicarious liability of parent corporations under CERCLA can properly be decided under state law without resort to a uniform federal common law rule. State law already provides for imposition of liability on cor-

porate owners through the well-established and often-applied doctrine of piercing the corporate veil. Under this doctrine, state law provides no refuge for parent corporations, especially when their subsidiaries are nothing more than the "alter ego" or "mere instrumentality" of the parent, or the corporate form has been used to perpetuate a fraud or injustice.

The federal interest in a uniform rule of decision is especially weak where, as here, the federal remedial statute has been interpreted to provide for strict, as well as joint and several liability. Since liability is joint and several under CERCLA, governmental and private litigants can recover fully on their claims, provided there is one solvent defendant. Therefore, this is not an instance where the undisputed federal interest in full recovery of remediation costs will be prejudiced by any slight variations in state corporations law and corporate veil-piercing tests. *See Atherton*, 117 S.Ct. at 671 ("[t]o invoke the concept of 'uniformity' . . . is not to prove its need"). In short, the interest in uniformity factor of the *Kimbell Foods* test supports adoption of state law as the federal rule for parent corporation liability as an operator under CERCLA section 107 (a)(2).

b. Application of State Law Would Not Frustrate CERCLA's Objectives

The second factor in the *Kimbell Foods* test also militates in favor of adopting state law in this instance, because the application of state corporations law would not frustrate CERCLA's objectives. An actual conflict between a "specific, concrete federal policy or interest" and state law is a "precondition" to fashioning a federal common law rule. *O'Melveny & Myers*, 512 U.S. at 88. "Generalized pleas for uniformity" may not serve as a substitute for "concrete evidence that adopting state law

would adversely affect [federal interests]." *Kimbell Foods*, 440 U.S. at 730. Petitioner has failed to carry its heavy burden in proving a "significant conflict" between use of state corporations law as the proper federal rule of decision and CERCLA's dual objectives of promptly cleaning up hazardous waste sites and imposing the costs of cleanup on those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).

Congress "intended for CERCLA to cast a wide net of responsibility for the costs of environmental cleanup." Pet. App. at 26a. CERCLA does not require that federal law displace state laws governing the liability of corporate owners, however, unless such laws permit action prohibited by the statute or unless "their application would be inconsistent with the federal policy underlying the cause of action." *Anspec*, 922 F.2d at 1249-50 (Kennedy, J., concurring) (quoting *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975)). Petitioner cites as evidence, the blanket assertion by one of the dissenters from the Sixth Circuit's decision that "following state law in this area would allow corporations to easily evade their environmental responsibilities under CERCLA by incorporating subsidiaries in states with stringent standards for piercing the corporate veil." Pet. App. at 26a. This concern is ill founded, illusory and misplaced. The application of state corporate law in this context "poses no significant threat to any identifiable federal policy or interest." *Anspec*, 922 F.3d at 1250 (Kennedy, J., concurring).

As then-Circuit Judge Kennedy observed with respect to CERCLA, state law more than adequately addresses the abuse of the corporate form as a means of attempting to avoid liability:

> Any fears that states will engage in a "race to the bottom" in their effort to attract corporate business and enact laws that will limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and the EPA and they share a complementary interest with the United States in enforcement of those laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.

Id.

Every state has clear and effective rules that permit government agencies and/or injured citizens to hold parent corporations liable as operators under CERCLA section 107(a)(2) when those corporations have abused the prerogatives of the corporate form. It cannot be said that these state laws operate to defeat CERCLA's goals.[11]

c. Application of Petitioner's Uniform Rule Would Substantially Disrupt Commercial Relationships Predicated on State Law.

The third factor identified by this Court in *Kimbell Foods* also calls for adopting state law for determining corporate owner liability under CERCLA section 107(a)-(2). This final prong of the choice of law inquiry "must

[11] Another potential justification for the invocation of a federal common law rule of decision regarding parent liability under CERCLA is to "enrich the fund" by imposing a more expansive approach to CERCLA liability that would permit the United States to "pick and choose" as to whether it wanted to proceed directly against corporate shareholders. Cf. *O'Melveny & Myers*, 512 U.S. at 88. This Court repeatedly has found such "more money" arguments to be unavailing. *Id.*; *Kimbell Foods*, 440 U.S. at 737-38.

consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Kimbell Foods*, 440 U.S. at 728-29.

Implementing a federal common law rule that discards traditional principles of corporate limited liability would have an enormous impact on commercial relationships predicated on state law. The corporation is a mainstay of the country's economy. The limited liability protection the corporate form provides materially motivates investment and business decisions every day. Existing state laws provide ample government regulation of parent-subsidiary corporate relationships and strike the appropriate balance between limited liability and protection for those injured by corporate abuse. Moreover, corporate owners rely on these state laws. Because it strikes at the heart of the corporate form, applying the federal common law rule urged by Petitioner would disrupt "commercial relationships predicated on state law." In *Kimbell Foods*, this Court declined to "override intricate state laws of general applicability on which private creditors base their daily commercial transactions." 440 U.S. at 729. A similar result is warranted here.

D. The Sixth Circuit Correctly Applied State Law and Upheld Traditional Concepts of Limited Liability Associated with the Corporate Form.

The Sixth Circuit's decision was necessary to allow continued reliance on the fundamental principle of limited liability, which has been long recognized as a beneficial feature of corporations law in the United States. Additionally, it is for Congress, not the courts, to determine whether the far-reaching scope of liability urged by

Petitioner sufficiently advances the goals of CERCLA to warrant such a dramatic disruption of business and corporate relationships.

1. Limited Corporate Liability Has Been Long Recognized and Approved by This Court.

It is a long established, central feature of corporations law that the liability of corporate owners is limited to their stake in the venture, absent abuse of the corporate form. As one federal court commented, it is basic to the theory of corporations law that "a corporation is a separate entity, a legal being having an existence separate and distinct from that of its owners. This attribute . . . enables the corporation's stockholders to limit their personal liability to the extent of their investment." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974). Equally basic is the notion that the corporate form should not be lightly discarded, because "limited liability is one of the principle purposes for which the law has created the corporation." *Id.*[12]

In *Anderson v. Abbott*, 321 U.S. 349, 361 (1944), this Court recognized that: "[n]ormally the corporation is an

[12] As stated by future Justice William Douglas in 1929, "[l]imited liability . . . is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it. It is legitimate for a man or group of men to stake only a part of their fortune on an enterprise. Legislatures, courts, and businesses have made it so." William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929). Commentators today continue to express such views. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 Chi. L. Rev. 89 (1985) ("[l]imited liability is a fundamental principle of corporate law").

insulator from liability on claims of creditors." The Court affirmed the legitimacy of this feature of the corporate form, acknowledging that "the fact that incorporation was desired in order to obtain limited liability does not defeat this purpose." *Id.* The Court then proceeded to discuss the applicability of limited liability and the considerable benefits the doctrine provides, noting, "[l]imited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Id.* at 362.

2. The Sixth Circuit's Decision Affirms and Continues the Broadly Shared Benefits of Limited Liability.

The decision of the Sixth Circuit appropriately preserves the concept of limited liability for corporations and the associated benefits to this nation's economy. Business and the modern economy rely on and use the corporate form and the accompanying fundamental principle of limited liability in shaping everyday transactions. The economic benefits transmitted through a corporate law regime featuring limited liability are numerous and far-reaching. Extensive scholarly work has thoroughly compiled and analyzed the advantages provided by limited liability. *See generally*, Phillip I. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (1987); Easterbrook and Fischel, *supra*.

Limited liability has been termed "indispensable for an organized securities market," as it contributes to the creation of efficient capital markets in several different ways. *See* Blumberg, at §4.02. Limited liability

allows investors to participate in an organized liquid market without concern for the relative wealth of other investors. This lowers information costs and consequently improves efficiency of capital development. *Id.* at §4.02.5.

Limited liability provides many additional advantages. First, limited liability facilitates the operation of very large scale enterprises. Without limited liability, the exposure to the risk levels inherently present in such enterprises would discourage investment. *Id.* at §4.02.2. Second, limited liability encourages diversification by protecting investors. Under a system which does not feature limited liability, an investor could lose all assets upon the failure of a single investment. The rational business strategy under unlimited liability "would be to minimize the number of securities [or companies] held." Easterbrook, at 97. Limited liability removes the disincentive to diversify. Blumberg, at §4.02.3. Third, limited liability facilitates optimal investment decisions by encouraging investments in risky but beneficial ventures. Limited liability reduces inefficient behavior by ensuring that projects are not rejected where prospects for long term profitability exist. Blumberg, at §4.02.8. Finally, the extension of limited liability to parent corporations prevents organizations whose shareholders are other corporations from operating at a competitive disadvantage compared to organizations comprised of individual shareholders. Easterbrook, at 111.

Limited corporate liability is essential to the management and operation of corporations, the efficient operation of capital markets, and the profitable functioning of the modern economy. The Sixth Circuit was correct to weigh this essential, fundamental principle, in determining that Congress did not intend to dramatically

change the rules with regard to recognition of the corporate form when it enacted CERCLA.

3. Any Decision to Change Fundamentally Corporate Limited Liability is Properly a Matter Only for Congress.

Overturning the decision of the Sixth Circuit and tampering with the traditional concept of limited liability, as urged by Petitioner, would have many adverse and widely-felt consequences. In addition to being fundamentally wrong and unfair for corporate owners, Petitioner's standard would have dramatic effects on both the environment and the economy. Accepting Petitioner's argument that this Court hold parent corporations directly liable for the acts of subsidiaries would mark "a dramatic departure from traditional corporation law." *Joslyn Mfg. Co.*, 893 F.2d at 82. Such a significant change of course can only be sanctioned by Congress. As the *Joslyn* court held, "[a]ny bold rewriting of corporate law in this area is best left to Congress." *Id.* at 83.

a. Petitioner's Standard is Fundamentally Unfair.

Adoption of the standard of liability proposed by Petitioner would be fundamentally unfair to parent corporations. Traditional rules of limited liability influence countless business decisions every day, including decisions of parent corporations related to the level and nature of their involvement in subsidiary companies. Petitioner would impose liability on parent corporations for conduct that was lawful at the time it occurred and that falls far short of the behavior necessary to disregard the corporate form of subsidiary companies. Imposition of such liability would improperly and completely frustrate parent corporate reliance on the principle of lim-

ited liability and is, therefore, unfair. *National Labor Relations Bd. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993) ("[w]here stockholders follow the technical rules that govern the corporate structure, they are entitled to rely on the protections of limited liability that the corporation affords").

b. Acceptance of Petitioner's Standard Would Have Adverse Environmental Consequences.

Adopting Petitioner's suggested standard of liability would also have adverse environmental consequences. A fundamental goal of CERCLA is to encourage voluntary cleanup of hazardous waste sites. H.R. Rep. No. 253, 99th Cong., 1st Sess. (1985) ("[i]t is the intent of this Committee to encourage private party cleanup at all sites"). Petitioner's proposed standard would have the opposite effect. Instead of encouraging voluntary participation in hazardous waste management and remediation, Petitioner's approach would encourage parent companies to adopt a "hands off" approach and to separate or distance themselves completely from any involvement with subsidiary companies facing potential environmental liabilities. As the Sixth Circuit concluded, "the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites." Pet. App. at 14a. In the absence of direct Congressional intent, this Court should not discard the "sensible and legitimate precautions" provided by traditional common law rules, since doing so would "actually contravene the public interest by discouraging businesses from being involved in" pollution prevention and remediation. *Id.* at 15a.

c. Acceptance of Petitioner's Standard Would Have Adverse Economic Consequences.

Adopting Petitioner's standard would also have adverse economic consequences in a broader sense, as well. First, exposing corporate owners of viable subsidiary companies to CERCLA liability would reduce, at the margin, any incentives to invest in industries which generate, either directly or indirectly, even small amounts of hazardous substances or wastes, no matter how beneficial the final product. Similarly, the virtually automatic extension of liability to parent corporations urged by Petitioner would negatively affect the efficiency of capital formation by imposing information gathering costs entirely out of line with investment risks and rewards. The consequent blurring of parent and subsidiary corporate forms would reduce investment transparency and create additional information asymmetries in financial markets. These forces would merely serve to raise the cost of capital with no discernible net environemntal benefit.

Each of the above-described consequences of the proposed discarding of traditional rules of limited corporate liability would be far-reaching and dramatic. As a result, any decision to impose the expanded standard of CERCLA operator liability proposed by the Petitioner invokes national policy implications which are a matter for Congress, rather than the Court, to decide. As this Court has previously stated, the function of weighing and appraising the costs of imposing new liability standards "is more appropriately for those who write the laws, rather than for those who interpret them." *O'Melveny & Myers*, 512 U.S. at 89.

CONCLUSION

For the foregoing reasons, USBIC urges the Court to affirm the Sixth Circuit's decision, and affirm that a parent corporation may not be held liable under CERCLA section 107(a)(2) as an "operator" of a facility owned or operated by a subsidiary corporation absent the existence of circumstances warranting piercing the corporate veil under applicable state law.

Respectfully submitted,

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